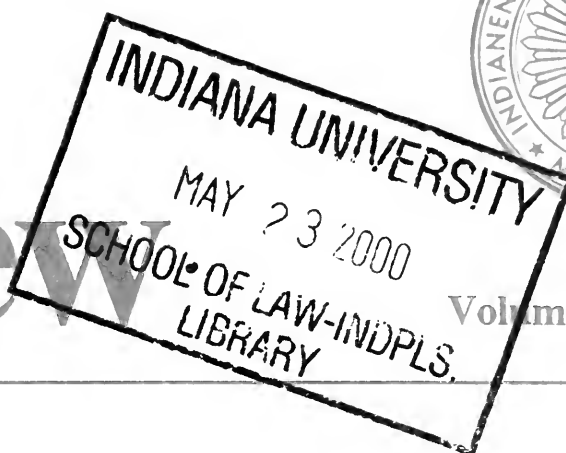


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ARTICLES

ANTITRUST IMMUNITY, THE FIRST AMENDMENT AND SETTLEMENTS: DEFINING THE BOUNDARIES OF THE RIGHT TO PETITION

RAYMOND KU*

INTRODUCTION

In the United States, the First Amendment¹ and the antitrust laws² serve as twin pillars upholding our political and economic liberty.³ What happens, however, when these powerful laws collide? This Article examines the interplay of the antitrust laws and the First Amendment right to petition,⁴ or what is more commonly referred to as *Noerr-Pennington* immunity.⁵ In brief, *Noerr* provides

* Associate Professor of Law, Thomas Jefferson School of Law; Director, Center for Law, Technology & Communications. A.B., Brown University; J.D., New York University School of Law; Fellow, Arthur Garfield Hays Civil Liberties Program (1994-95). I would like to thank Michael Farber for his insightful comments and suggestions on earlier drafts of this Article as well as the faculties of Southern Illinois University School of Law, St. Thomas University School of Law, and Thomas Jefferson School of Law where earlier versions of this Article were presented. I would also like to thank my research assistant Carlos Cabrera for his assistance. Special thanks to my wife, Melissa, for her comments, patience, and support without which this would not have been possible.

1. U.S. CONST. amend. I.

2. See Sherman Anti-Trust Act, 15 U.S.C. § 1 (1994 & Supp. IV 1998) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .").

3. See *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.").

4. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

5. The *Noerr-Pennington* doctrine, hereinafter *Noerr*, refers to a series of decisions by the United States Supreme Court beginning with *Eastern Railroad Presidents Conference v. Noerr*

immunity from antitrust liability for anticompetitive harms that flow from exercising the right to petition.⁶ While significant attention has been paid to the potential for *Noerr* immunity to be misused in efforts to use governmental processes to impose costs upon competitors,⁷ there has been virtually no discussion with respect to whether the First Amendment right to petition may be used to immunize cooperative/collusive behavior that could nonetheless adversely impact competition.⁸ This has been compounded by the Supreme Court's failure to articulate a clear explanation for when private conduct is considered immune under the First Amendment.⁹ Moreover, while there have been scholarly efforts to provide a coherent doctrine governing when private conduct is immune from antitrust liability, none has provided a doctrinal explanation of *Noerr* immunity through the lens of the right to petition that is consistent with its historic role in Anglo-American government.¹⁰ Specifically,

Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), in which the Court recognized antitrust immunity for certain conduct related to the right to petition.

6. See generally 2 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 989-1016 (3d ed. 1992) (discussing *Noerr* doctrine) [hereinafter ALD].

7. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347-64 (1993); Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977); James D. Hurwitz, *Abuse of Governmental Process, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L. J. 65 (1985); David L. Meyer, *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate*, 95 YALE L. J. 832 (1986); see also *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) ("The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.").

8. For one of the few examples of such a discussion, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996), examining collusion between class action counsel with respect to attorneys' fees and whether such abuse is sanctionable. See also Harry M. Reasoner & Scott J. Adler, *The Settlement of Litigation as a Ground for Antitrust Liability*, 50 ANTITRUST L. J. 115 (1981).

9. See, e.g., Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1178 (1992) ("The problem was more than a failure to set forth clear general rules for defining the scope of the immunity. The larger problem was that, as the exceptions were defined, adjudication consisted of pasting a conclusory label on the petitioning activity at issue."); David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J. L. & PUB. POL'Y 293, 298 (1994) (noting that the area of law is replete with "doctrinal confusion").

10. See, e.g., Elhauge, *supra* note 9, at 1202 ("What justifies antitrust immunity is not the means chose 'but a disinterested and accountable decisionmaking process for choosing those means. As long as neither the government nor its officials has a financial interest in the governmental action, antitrust immunity should apply to both the government and the petitioners."); Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990) (analyzing petitioning immunity under

this Article examines whether settlement agreements and consent decrees resulting from what would otherwise be immunized litigation are protected from antitrust scrutiny and liability under *Noerr*. In order to conduct this analysis, this Article develops a methodology for determining immunity by focusing the immunity examination upon the means used to petition government and the source of the alleged injuries.¹¹ Ultimately, private conduct is immune from antitrust scrutiny when it represents a valid attempt to persuade an independent governmental decision-maker in an effort to solicit government action, and the alleged injuries result from that persuasive effort.¹² The validity of any effort depends upon the forum in which the petitioning is conducted without reference to antitrust. By focusing upon the means used to petition government, this analysis ensures that *Noerr* immunity protects the people's right to petition their government for the redress of grievances without unnecessarily limiting the protection afforded by the antitrust laws.

One commentator has observed that "[t]he notion that the settlement of litigation—a practice so favored in the administration of justice—is in itself a ground of antitrust liability rings strange to the ear."¹³ Before we decide whether the instrument needs tuning or our hearing needs testing, consider two hypotheticals:

- 1) Netscape sues Microsoft in private antitrust litigation raising antitrust, intellectual property, and state unfair competition claims. During the course of the litigation, the parties begin to negotiate and realize that it would be mutually advantageous for the two leading providers of Internet browser software to divide the market between themselves rather than continue litigating and competing against one another. For example, Microsoft might agree to cease distribution of its browser and instead

public choice theory).

In one of the most lucid discussions on this topic, Professor Elhauge argues for a functional process approach in which immunity is primarily determined by examining the "incentive structure underlying the decisionmaking process that produces the restraint . . ." Elhauge, *supra* note 9, at 1180. Others have argued that immunity should be examined under principles akin to public fora analysis in free speech cases. See McGowan & Lemley, *supra* note 9. More often, commentators attempt to interpret *Noerr* immunity through the filter of federal antitrust policy. See, e.g., Meyer, *supra* note 7, at 832 (proposing that "immunity [should] not be granted when . . . petitioning produces unnecessary direct antitrust injury and the governmental action sought is illegitimate.") (emphasis added); James S. Wrona, *A Clash of Titans: The First Amendment Right to Petition vs. the Antitrust Laws*, 28 NEW ENG. L. REV. 637, 656 (1994) ("When analyzing antitrust cases involving petitioning to the government, courts focus on whether the activity's effect would seriously offend traditional antitrust policies. . . . This approach maintains a delicate balance between two important principles.").

11. See *infra* Part II.

12. See *infra* Part II.

13. Reasoner & Adler, *supra* note 8, at 115.

incorporate Netscape's browser into its Windows operating system. In exchange, Netscape would agree to drop its lawsuit and share revenues with Microsoft. The end result of course would be an agreement between the two dominant players in the browser industry effectively dividing the market between themselves.

- 2) A group of small to mid-size book sellers sue the various publishing companies alleging price discrimination in response to an industry practice in which book publishers sell various titles to larger retail establishments such as Barnes & Noble at significantly discounted prices. During the litigation, the plaintiffs enter into settlement agreements with each of the various publisher defendants setting an appropriate wholesale price for books with each of the settlement agreements containing a most favored nation clause that incorporates the most favorable price reached in the negotiations of each agreement. Once the final settlement is reached, there will effectively be a single, uniform wholesale price for books throughout the entire industry. In the final *coup de grace*, the parties could even ask the court to approve the terms of the settlement agreement and enter them as part of a consent decree.

If entered into outside of the context of litigation, these hypothetical agreements would almost certainly be subject to antitrust scrutiny, and could potentially result in significant antitrust liability.¹⁴ The critical question, therefore, is whether the context and nature of entering into these agreements with respect to the settlement of litigation are sufficiently distinct under constitutional principles to remove them from the purview of antitrust laws.

The implications if such immunity is recognized are staggering. If settlement agreements such as these are immune from antitrust scrutiny under *Noerr* and the participants immune from liability, no one, not the Federal government, the various state governments, let alone competitors, would be permitted to challenge or even examine the terms and consequences of the agreements—this immunity is the essential promise of the right to petition as recognized under *Noerr*.¹⁵ When combined with the growing use of protective orders to cloak settlement agreements in secrecy,¹⁶ entire industries may be monopolized, prices fixed, and

14. The first hypothetical could be considered a horizontal restraint of trade or a conspiracy to monopolize the web browsing industry. See 1 ALD, *supra* note 6, at 60-77, 195-96. The second hypothetical could be considered an unreasonable restraint of trade as a result of price fixing. See *id.* at 63-67.

15. See *infra* Part I.B.

16. See, e.g., Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (discussing secrecy in the settlement process).

have their markets divided, without anyone being the wiser. So, while the notion that settlement agreements may be the basis for antitrust liability "may ring strange to the ear," the opposite conclusion also strikes a rather discordant note. Immunity under these circumstances represents a loophole large enough to swallow the Sherman Act itself. Despite this potential, the highest court to touch upon this issue to date suggested that so long as the litigation itself is not a sham, immunity is compelled by Constitutional principles.¹⁷

This Article analyzes the right to petition and the *Noerr* doctrine and suggests that immunity under *Noerr* is justified only when the conduct in question represents valid petitioning, and argues that settlement agreements and consent decrees should not be immune from antitrust scrutiny even when a court is asked to approve the agreement prior to dismissal. Part I examines the history of the right to petition and doctrinal development of the right in the antitrust context, and how that case law could be used to support a claim for immunity. Part II develops from the right's history and the Supreme Court's case law, a methodology for determining when private conduct is immune from antitrust scrutiny under *Noerr* and the right to petition. Part III examines the context of private settlements under the proposed methodology and concludes that in the context of the settlement of litigation, the historical, jurisprudential, and doctrinal justifications for immunity are noticeably absent. After examining whether judicial approval of settlements and their incorporation into consent decrees are sufficient to justify *Noerr* immunity, Part IV concludes that the right to petition is still insufficient to justify antitrust immunity.

I. ORIGINS

Before examining whether settlement agreements and consent decrees should be protected by the right to petition, a brief discussion of the origins of the right is in order. The right to petition is the capstone right of the First Amendment, but, outside the context of antitrust, it is seldom discussed or invoked in constitutional jurisprudence.¹⁸ When it is discussed, it is usually treated as

17. See *Columbia Pictures Indus. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528-29 (9th Cir. 1991), *aff'd on other grounds*, 508 U.S. 49 (1993). The Supreme Court has never directly addressed this issue. In *Standard Oil Co. v. United States*, 283 U.S. 163 (1931), the Court examined whether certain cross-licensing agreements between patent holders entered into in order to settle infringement suits violated the Sherman Act. See *id.* at 168. While the decision could be interpreted to recognize that settlement agreements are not immune from antitrust laws, the decision predates *Noerr*, and as such, the Court was not directly confronted with the issue of immunity. Similarly in *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963), decided after *Noerr*, the Court once again examined whether cross-licensing agreements entered into to end litigation violated the antitrust laws. See *id.* at 177-78. Despite being asked, the Court specifically refused to address whether the settlement agreements themselves could form the basis for antitrust liability. See *id.* at 190 n.7.

18. See, e.g., Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998); Norman B. Smith, "Shall Make No Law

simply part of the rights of free expression and association.¹⁹ Even in the context of antitrust law, the development of the right to petition is a relatively recent event. It was not until 1961 in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,²⁰ that the Supreme Court slowly began to interpret the right to petition and how it impacts antitrust law.

A. The History

1. *The Classical Right of Petitioning*.—Historically, the right to petition was considered one of the most fundamental of English and colonial American rights.²¹ In England, the petition was used to secure the Magna Carta, and its abuse by James II “led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right to petition as an element of the British constitution [sic].”²² By the Seventeenth Century, petitioning was considered an ancient right and was part of the regular political life of the English.²³ According to one commentator, unlike freedom of speech, press, and assembly which were in practice constantly restrained, by the Eighteenth Century, the right to petition was an absolute right in England.²⁴

Likewise, in the American colonies and the United States prior to the Civil War, the right to petition was equally esteemed. For example, in 1641 the Massachusetts Bay Colony Assembly became the first colony to affirm the right explicitly, and, by its terms, the right applied to residents and non-residents, free and not free alike.

Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, where of that meeting hath proper

Abridging . . .: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17 (1993); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986). For a general overview of the Supreme Court’s interpretation of the right to petition, see John E. Theuman, Annotation, *Right of Petition and Assembly Under Federal Constitution’s First Amendment—Supreme Court Cases*, 86 L.Ed.2d 758 (1985); Jean F. Rydstrom, Annotation, *The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances*, 30 L.Ed.2d 914 (1973).

19. See Rydstrom, *supra* note 18, at 915.

20. 365 U.S. 127 (1961).

21. See Mark, *supra* note 18, at 2169; Smith, *supra* note 18, at 1153; Spanbauer, *supra* note 18, at 17; Higginson, *supra* note 18, at 155.

22. Smith, *supra* note 18, at 1160.

23. See *id.* at 1157.

24. See *id.* at 1162-68; see also Spanbauer, *supra* note 18, at 17 (arguing that “[h]istorically, the right to petition was a distinct right, superior to the other expressive rights.”).

cognizance, so it be done in convenient time, due order, and respective manner.²⁵

As one commentator notes, the “Colonial experience appears not only to have replicated England’s widespread use of the petition, it likely extended it in both law and practice.”²⁶ In part, this was because the petition was a useful means for colonial assemblies to expand their sphere of influence by expanding both the types of matters the assemblies had jurisdiction to consider and their power to gather facts relating to the petitions.²⁷ Petitions covered all sorts of subject matter from disputes over land, termination of entail, and financial assistance to emancipation.²⁸

Additionally, the right to petition not only covered diverse subject matter but was exercised by the elite as well as individuals and groups who were otherwise excluded from voting and other means of formal political participation.²⁹ For example, in the colonies and the fledgling United States, the right was exercised by disenfranchised groups such as women, blacks, Native Americans, and children.³⁰ The fact that the right to petition extended to such disenfranchised groups may be surprising to us today, but it is quite understandable given the origins of petitioning. Petitioning originally arose under Monarchical rule when everyone was subordinate to the divine authority of the King.³¹ No one had the right to vote, participate in ruling, or any of the other political rights recognized in the United States today.³² As such, petitioning arose as the original, and for a time, the only protected means for subjects to seek limited political change.³³ While the subjects could not change or challenge their ruler’s authority short of revolution, the right of petition allowed them to attempt to change the rules and how they were applied. Given the origins of the right and the important role it

25. Mark, *supra* note 18, at 2177 (citation omitted).

26. *Id.* at 2175.

27. See Higginson, *supra* note 18, at 146-47.

28. See Mark, *supra* note 18, at 2182-85.

29. See *id.* at 2182-87.

30. See *id.*

31. See *id.* at 2164 (“Magna Carta is, however, hailed as the progenitor of English constitutional liberty because it came to provide a formal check on royal authority that could be exercised by other segments of English society as well.”).

32. See *id.* at 2165.

By requiring the petitioners to acknowledge the primacy of the king’s authority, even the barons’ petitions thus reinforced the hierarchy of the community to which all belonged. Although the barons’ petitions could force the King’s attention, their petitions . . . do not . . . immediately appear to have contained within themselves the empowering or dignity-enhancing features we today associate with the exercise of liberties.

Id.

33. Cf. Spanbauer, *supra* note 18, at 32 (“[P]etitions were the only authorized channel through which criticism of the government was funneled.”).

played in English and colonial American history, it should not come as a surprise, therefore, that it was expressly included in the vast majority of state declarations of rights, or that Maryland, New York, North Carolina, and Virginia, specifically insisted that the right be guaranteed when they ratified the Federal Constitution.³⁴

The debates surrounding the adoption of the First Amendment also demonstrate that the right maintained its significance even in the new republic. "The democratic experience of the Confederation period led not to a belief that petitioning was irrelevant, but instead renewed the question of whether, as it were, the ante should be upped. Should petitions become instructions rather than mere prayers?"³⁵ In the debates that ensued, Congress rejected the notion that the people should have the right to instruct their representatives, but reaffirmed the principle that their petitions must be respected.

Instruction, then, was the enemy of deliberation, and not just because each state's or each district's parochialism might subvert the common, national good. Instruction also rendered deliberation superfluous because the representative could do only what his instructions mandated. Better, said the Federalists, to avoid this problem and take the advice and wisdom of the people through their speech and the press, and, when they assembled among themselves and conveyed their grievances, through the time-honored method of petition. Congress was meant to be not a "mere passive machine," but rather a "deliberative body." Petition would serve that end, instruction would destroy it.³⁶

In rejecting the right of instruction while embracing petitioning, Congress implicitly recognized that individuals, through petitioning, could command the government's attention, but not any particular result. In the early years, Congress put this understanding into practice as it "attempted to pass favorably or unfavorably on every petition . . .,"³⁷ a practice which continued until the swell of emancipation petitions overwhelmed Antebellum Congresses,³⁸ and Americans had informally replaced the classical conception of petition and reciprocal obligation with "[b]rute political power grounded in the franchise."³⁹

2. *The Promise.*—Two features, the right to be heard and immunity, are central to the classical right of petition. Functionally, the right to petition "was an affirmative, remedial right which required governmental hearing and response."⁴⁰ Petitioning was a means by which individuals could have the King, the Commons, colonial assemblies, state legislatures, Congress, and the courts redress private and public grievances.⁴¹ In England, the right represented "a

34. See Smith, *supra* note 18, at 1174.

35. Mark, *supra* note 18, at 2206.

36. *Id.* at 2211-12 (footnotes omitted).

37. Higginson, *supra* note 18, at 143.

38. See *id.* at 158-165; Mark, *supra* note 18, at 2212-26.

39. Mark, *supra* note 18, at 2226.

40. Higginson, *supra* note 18, at 142.

41. See Mark, *supra* note 18, at 2168.

mechanism that bound the English together in a web of mutual obligation and acknowledgment of certain commonalities.”⁴² The right

reflected an element of reciprocal obligation, embodying the recognition of hierarchy both in that every petition was a prayer to authority for the grace of assistance as well as an implicit acknowledgment by the petition that the King . . . had authority—that is, legitimate power—to resolve the complaint. In accepting the petition, the King, in turn, acknowledged a duty to subjects, one that had come to mean both hearing the complaint and not exercising power in an arbitrary fashion.⁴³

Likewise in colonial America:

Petitioning provided not just a method whereby individuals . . . might seek reversal of harsh treatments by public authority, judicial or otherwise, but also a method whereby such individuals could seek the employment of public power to redress private wrongs that did not fit neatly into categories of action giving rise to a lawsuit. In that sense, even individual grievances embodied in petitions carried powerful political weight simply because of the individual’s capacity to invoke public power.⁴⁴

Accordingly, the petition was a formal mechanism that allowed individuals to focus government attention on public or private issues of their choosing with a corresponding right to be considered. In other words, the right to petition allowed individuals to exert some control over legislative agendas.⁴⁵

Given the right’s grounding in the principle that those who govern owe some duty to the governed, it is not surprising that petitioning’s development is linked to the development of popular sovereignty both in England and the American colonies.⁴⁶ While originally based upon the mutual obligations between the divine authority of the King and those he governed, grounded in the principles of natural hierarchy and deference to higher authority, petitioning evolved with the emergence of popular sovereignty.⁴⁷ Madison described petitioning’s role in the American Constitutional order as recognizing that “[t]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will.”⁴⁸ Consequently, in the United States, petitions were no

42. *Id.* at 2169.

43. *Id.*

44. *Id.* at 2182 (citations omitted).

45. See Higginson, *supra* note 18, at 142-54.

46. See Smith, *supra* note 18, at 1180-81.

47. See generally EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988) (discussing the history of popular sovereignty in England and the United States).

48. Smith, *supra* note 18, at 1182 (quoting 1 ANNALS OF CONG. 738 (Joseph Gales ed., 1789)).

longer "the prayers of supplicants, but the missives 'of a free people [to] their servants.'" ⁴⁹

Supplementing the affirmative right to command government attention was the necessary corollary of the right—immunity from government prosecution. Beginning with the English petition in 1013 to Aethelred the Unready who promised not to retaliate against the petitioners, freedom from punishment has been one of the "central features of the history of petitioning."⁵⁰ If the right to ask government to redress grievances, including grievances against the government, was to have any meaning, those exercising that right had to be immune from prosecution particularly for crimes against the state such as treason and sedition.

While the history of petitioning records instances in both England and the United States in which petitioners were in fact prosecuted for petitioning, ultimately, those punished were generally released and their prosecution only served to provide greater recognition for the right.⁵¹ For example, in the Case of the Seven Bishops, the bishops petitioned James II asking to be relieved from his declaration that they read the Liberty of Conscience during their services, and were prosecuted for seditious libel. Not only were the bishops ultimately acquitted after their counsel argued that subjects have the right to petition the King, their prosecution "led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right of petition as an element of the British constitution [sic]."⁵²

Similarly, in the United States, of the seventeen cases prosecuted under the Alien and Sedition laws only one involved petitioning activity.⁵³ Jedediah Peck was indicted under the Sedition Act⁵⁴ for circulating a petition to Congress advocating the repeal of the Alien and Sedition laws. Crowds of supporters not only cheered for him upon his arrest, public demonstrations and pressure led the prosecution to drop the case.⁵⁵ Following Peck's case, no other petitioners were indicted for challenging the constitutionality of those laws.⁵⁶ In contrast, Thomas

49. Mark, *supra* note 18, at 2205 (quoting *Philadelpheensis*, No. 5, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 116 (Herbert J. Storing ed., 1981)).

50. Smith, *supra* note 18, at 1154-55.

51. *See id.* at 1162-66, 1175-77.

52. *Id.* at 1160-61.

53. *See id.* at 1176.

54. The Sedition Act

[M]ade it a crime, punishable by a \$5000 fine and five years in prison, if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

New York Times Co. v. Sullivan, 376 U.S. 254, 273-74 (1964) (quoting 1 Stat. 596 (1798)).

55. *See* Smith, *supra* note 18, at 1176.

56. *See id.* at 1177.

Jefferson had to issue a presidential pardon for those convicted based upon their speech,⁵⁷ and it was almost 200 years before the United States Supreme Court explicitly recognized that the Sedition laws violated principles of free speech.⁵⁸ Therefore, even during eras and regimes in which speech was prosecuted and the press thoroughly regulated, petitioning was afforded significantly greater protection.⁵⁹ Consequently, the classical right to petition operated both as a sword to invoke public power and a shield to protect against government prosecution.

3. *The Historical Limits.*—Even classical petitioning, however, was not without its limits. Because the classical right to petition imposed upon government formal obligations to hear the petition and refrain from prosecuting the petitioners, petitions had to be differentiated from other forms of communication. As Professor Mark has noted:

A petition was the beginning of an official action, part of a “course of justice,” not just a passing of information, even though the conveying of information *to the proper authority* was a powerful justification for petitions. Just as a claim brought in court required submission in a certain manner, so did a complaint brought by petition, even if the forms required of petitioners never quite equalled [sic] in punctiliousness those required of plaintiffs at common law.⁶⁰

As developed in English law, therefore, “[a] petition was a communication that, 1) had to be addressed to an authority such as the King, 2) had to state a grievance, and, 3) had to pray for relief.”⁶¹ Petitions had to have “petitionary parts”⁶² and had to be signed by those “legitimately allowed to request a redress of grievances.”⁶³ Parliament also placed limits on the number of signatures that could appear on a petition and on the number of individuals allowed to present it.⁶⁴ According to Blackstone, these restrictions were justified “as a means of avoiding riots or disruptive presentation of petitions.”⁶⁵

The English were not the only ones to place restrictions on the right to petition; the American colonies also placed limited restrictions upon the right. In colonial America, colonial assemblies adopted rules and regulations punishing

57. See *New York Times Co.*, 376 U.S. at 276.

58. See *id.* (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.”).

59. See Smith, *supra* note 18, at 1168-69; Spanbauer, *supra* note 18, at 34-40.

60. Mark, *supra* note 18, at 2174 (citations omitted).

61. *Id.* at 2173.

62. *Id.* at 2228 n.358.

63. *Id.* at 2220.

64. See Spanbauer, *supra* note 18, at 27.

65. *Id.* at 26-27 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 138-39 (Univ. of Chicago Press 1979)).

the filing of meritless petitions.⁶⁶ Under these rules, the petitioner could be fined and made to bear the cost of filing the meritless petition.⁶⁷ These limitations, however, were not intended or applied to punish individuals based upon the viewpoints expressed in the petitions. Instead, they were attempts to ensure "that petitions with merit would be heard while individuals would be protected from defending baseless actions."⁶⁸ Despite these limitations, as the principal means for criticizing government and seeking political change, the classical right to petition was one of the most important rights of its time.

B. The Noerr Doctrine

In the context of antitrust law, the development of the right to petition begins with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,⁶⁹ in which the Supreme Court considered whether the Sherman Act should be applied to a publicity and lobbying effort conducted by twenty-four railroads to restrict competition from the trucking industry.⁷⁰ The railroads carried out their campaign through deceptive and unethical means with the sole aim of pursuing legislation that would destroy the trucking competition.⁷¹ However, because "the railroads were making a genuine effort to influence legislation and law enforcement practices," the Court held that their conduct was absolutely immune from antitrust liability.⁷²

Writing for the Court, Justice Black emphasized that there is an "essential dissimilarity" between agreements to petition for laws that would restrain trade and private agreements that directly restrain trade, and that to condemn the lobbying effort "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."⁷³ A contrary conclusion "would raise important constitutional questions,"⁷⁴ as the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."⁷⁵

In reaching this conclusion the Court recognized the structural importance of the right to petition. In a representative democracy, government represents the will of the people. If the people cannot make their wishes known to their agents, especially when they seek changes to the existing legal order, government would

66. See *id.* at 31.

67. See *id.*

68. *Id.*

69. 365 U.S. 127 (1961).

70. See *id.*

71. See *id.* at 129.

72. *Id.* at 144-45.

73. *Id.* at 136-37.

74. *Id.* at 138.

75. *Id.*

no longer represent the people in their sovereign capacity.⁷⁶ “In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”⁷⁷ Punishing individuals for efforts to “influence the passage or enforcement of laws” even by the deceptive publicity adopted by the railroads, therefore, would be inconsistent with the principles of free government.⁷⁸

The Court, however, was unwilling to immunize any and all efforts to influence government. The Court cautioned that “[t]here may be situations in which a . . . campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to *interfere directly* with the business relationships of a competitor and the application of the Sherman Act would be justified.”⁷⁹ Widely known as the “sham” exception, the Court’s reservation has been the subject of extensive discussion notably for the Court’s failure, until recently, to provide any additional guidance as to what sorts of activities fell within the exception.⁸⁰

In a series of decisions, following *Noerr Motor Freight*, the Supreme Court extended immunity from antitrust liability to attempts to influence members of the executive branch of government as well as the judiciary. In *United Mine Workers v. Pennington*,⁸¹ the Court concluded that *Noerr* applied to the efforts of large coal mine operators and the United Mine Workers to persuade the Secretary of Labor to establish a higher minimum wage and convincing the Tennessee Valley Authority to curtail certain market purchases in order to eliminate smaller competitors.⁸² The Court held that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme violative of the Sherman Act.”⁸³

Subsequently, in *California Motor Transport Co. v. Trucking Unlimited*,⁸⁴ the Court concluded that:

76. See *id.* at 137.

77. *Id.*

78. *Id.* at 140-41 (“[A] publicity campaign to influence governmental action falls clearly into the category of political activity.”).

79. *Id.* at 144 (emphasis added).

80. See, e.g., Robert P. Faulkner, *The Foundations of Noerr-Pennington and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of a “Clear and Convincing” Standard*, 28 U.S.F. L. REV. 681 (1994); Milton Handler & Richard A. De Sevo, *The Noerr Doctrine and Its Sham Exception*, 6 CARDOZO L. REV. 1 (1984); James B. Perrine, Comment, *Defining the “Sham Litigation” Exception to the Noerr-Pennington Antitrust Immunity Doctrine: An Analysis of the Professional Real Estate Investors v. Columbia Pictures Industries Decision*, 46 ALA. L. REV. 815 (1995).

81. 381 U.S. 657 (1965).

82. See *id.* at 660.

83. *Id.* at 670.

84. 404 U.S. 508 (1972).

[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.⁸⁵

"Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."⁸⁶ However, despite reaching that conclusion, the Court found that the alleged conduct would fall outside *Noerr* protection under the "sham" exception.⁸⁷ The controversy in *California Motor Transport* was between intrastate and interstate trucking firms in which the interstate firms allegedly conspired to oppose all applications filed by the intrastate firms for operating rights before the California Public Utilities Commission or the Interstate Commerce Commission.⁸⁸ According to the Court, "[A] pattern of baseless, repetitive claims . . . effectively barring respondents from access to the agencies and courts" would not qualify for immunity under the "umbrella of 'political expression.'"⁸⁹

Following its initial trilogy, the Court has taken some steps to define what it meant by "sham." Based on the Supreme Court's decisions, the sham exception became a catchall limit to petitioning immunity.⁹⁰ Lack of a clear definition led primarily to a split over the extent to which the petitioning party's intent could form the basis for denying immunity.⁹¹ For example, Judge Posner concluded that even lawsuits presenting colorable claims could constitute sham conduct if the principal aim in bringing to suit was to burden competitors with the cost of litigation regardless of the outcome of the case.⁹² In contrast, the Sixth Circuit ruled that the "sham exception does not apply merely because a party files a suit with the principle purpose of harming his competitor."⁹³ In its initial response, the Court made clear that private activity can only be considered a sham if it is "not genuinely aimed at procuring favorable government action."⁹⁴

85. *Id.* at 510-11.

86. *Id.* at 510.

87. *See id.* at 511-12.

88. *See id.* at 509.

89. *Id.* at 513.

90. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 203.1a, at 19 (1996 Supp.) ("Some courts and commentators use it as a catchall for any activity that is not afforded *Noerr* protection."); Handler & De Sevo, *supra* note 80 (employing expansive definition of sham).

91. *See* ALD, *supra* note 6, at 1002-05.

92. *See* Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 471-72 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).

93. *Westmac, Inc. v. Smith*, 797 F.2d 313, 317 (6th Cir. 1986), *cert. denied*, 479 U.S. 1035 (1987).

94. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988).

Subsequently, the Court finally provided a definitive definition for what constitutes a “sham” in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*⁹⁵ The Court adopted a two-part test:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere directly with the business relationships of a competitor” . . . through the “use [of] governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.”⁹⁶

Accordingly, the Supreme Court clarified that *Noerr* immunity protects all objectively reasonable acts of petitioning government regardless of intent.

Lastly, in addition to protecting the “act” of petitioning itself, courts recognize that *Noerr* immunity protects what can be described as “incidental” acts associated with “a valid effort to influence governmental action.”⁹⁷ For example, the Supreme Court in *Noerr Motor Freight* concluded that even the deceptive advertising aimed at the public could not form the basis for antitrust liability because it was “incidental” to a valid effort to solicit government action.⁹⁸ Along these lines, in the context of litigation, courts have held that the decision not to settle a law suit could not form an independent basis for antitrust liability,⁹⁹ nor could the publicity associated with a lawsuit.¹⁰⁰

The application of petitioning immunity to all three branches of government is consistent with the classical right to petition.¹⁰¹ As discussed above, one of the primary protections offered by the right to petition was immunity from formal

95. 508 U.S. 49 (1993).

96. *Id.* at 60-61 (citations omitted).

97. *Allied Tube*, 486 U.S. at 499.

98. *Id.* at 505.

99. *See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528-29 (9th Cir. 1991).

100. *See Aircapital Cablevision, Inc. v. Starlink Communications Group*, 634 F. Supp. 316, 324 (D. Kansas 1986) (holding that publicity associated with an antitrust lawsuit could not form the basis for antitrust liability).

101. *But see McGowan & Lemley*, *supra* note 9, at 384-89 (arguing that the right to petition should not apply to the courts). McGowan & Lemley’s argument, however, overlooks the fact that historically the right to petition was recognized as applying to the judiciary. Moreover, their argument overlooks that functionally and occasionally in name as well, pleadings filed with courts are the closest example of classical petitioning as they not only ask “government for the redress of grievances” but they command its attention as well.

efforts to invoke governmental power.¹⁰² As petitions could be filed with the King, legislatures, or courts, immunity followed in all three contexts. Historically, the right was recognized by each of the branches as an effort to draw more power unto themselves.¹⁰³ Its modern day application is consistent with the principle of popular sovereignty and that all three branches of government are subordinate to and agents of the sovereign people.¹⁰⁴ This conclusion is also consistent with the drafting of the First Amendment. The original draft stated, "The people shall not be restrained . . . from applying to the legislatures by petitions, or remonstrances for redress of their grievances."¹⁰⁵ The Senate rewrote the petition language with perhaps the most significant change being the replacement of "Legislature" with "Government."¹⁰⁶ By replacing legislature with government, Congress clearly intended that the right should apply to all three branches. Consequently, the Supreme Court's development of the right under *Noerr* is consistent with the right's Anglo-American history.

The Supreme Court's treatment of the right to petition does differ, however, from the classical right in one important aspect: as the preceding decisions demonstrate, the Court has extended immunity beyond the formal act of written petitioning itself to what can be described as informal petitioning.¹⁰⁷ With the exception of *California Motor Transport* in which the defendants had in fact filed formal "petitions" in the form of court documents,¹⁰⁸ neither *Noerr Motor Freight* nor *Pennington* involved formal written petitions to the governmental bodies at issue. Instead, they dealt primarily with lobbying and other informal avenues of political persuasion. In *Noerr*, for example, the primary conduct immunized by the Court was a deceptive public relations campaign designed to

102. See *supra* Part I.A.2.

103. See Mark, *supra* note 18, at 2191; Higginson, *supra* note 18, at 150-53.

104. See generally MORGAN, *supra* note 47 (describing the differences in popular sovereignty between England and the United States); Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 547-57 (1995) (discussing the role of popular sovereignty in creating a Constitutional scheme of government). See also Smith, *supra* note 18, at 1177 (noting that Madison critiqued the Alien and Sedition laws as "retreating toward the exploded doctrine that the administrators of the Government are the masters and not the servants of the people") (citation omitted).

105. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1789-1791, at 10, 16 (Charlene B. Bickford & Helen E. Veit eds., 1986).

106. See Smith *supra* note 18, at 1175; Spanbauer, *supra* note 18, at 40.

107. The extension of petitioning immunity to encompass informal acts of petitioning is in part responsible for the doctrinal confusion surrounding *Noerr*. If the court had concluded that the right to petition protected only the formal act of submitting a classical petition, it would be a simple matter to determine whether the right was implicated or not. By also protecting informal acts, it is now necessary to come up with a means to distinguish between informal acts of petitioning and other non-protected conduct. To date, the Court has failed to clearly articulate a method for making such a determination.

108. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972).

influence Pennsylvania's Governor, Legislature, and people,¹⁰⁹ while, in *Pennington*, the immunized conduct was the lobbying of the Secretary of Labor and the Tennessee Valley Authority.¹¹⁰ More recently, the Court has recognized that even letters to the President of the United States could be considered protected under the right to petition.¹¹¹ However, according to Justice Douglas, the right "is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor."¹¹²

This extension of petitioning immunity beyond formal acts of petitioning is consistent with the adoption of the First Amendment. For example, James Madison, who is often considered one of the principal architects behind the petitioning clause of the First Amendment,¹¹³ noted in the debates over whether the people should have a right to instruct their representatives that "[t]he people may [instead] publicly address their representatives, may privately advise them, or declare their sentiment by petitions to the whole body; in all these ways they may communicate their will."¹¹⁴ In this statement, Madison explicitly recognized that the people's right extended beyond formal petitioning to informal acts such as publicly addressing them or privately advising them.

The protection of informal acts of petitioning is also consistent with current State recognition of petitioning. For example, a growing number of states protect individuals from SLAPP suits (Strategic Lawsuits Against Public Participation).¹¹⁵ SLAPP suits are lawsuits brought in retaliation for the defendant's attempt to influence governmental action by, for example, testifying at a public hearing to have property rezoned to the disadvantage of the plaintiff.¹¹⁶ As such they clearly implicate the right to petition as efforts to punish individuals for exercising that right.¹¹⁷ The legislative response to such

109. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 130-33 (1961).

110. See *United Mine Workers v. Pennington*, 381 U.S. 657, 659-60 (1965).

111. See *McDonald v. Smith*, 472 U.S. 479, 484 (1985).

112. *Adderley v. Florida*, 385 U.S. 39, 50 (1966) (Douglas, J., dissenting).

113. See Spanbauer, *supra* note 18, at 39-40; Higginson, *supra* note 18, at 155-56.

114. Smith, *supra* note 18, at 1182 (quoting 1 ANNALS OF CONG. 738 (1789)).

115. See Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385 (1988) (coining the term SLAPP suits); Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 131 (1996) (noting that SLAPP suits are a growing public concern). Currently, eight states have statutes protecting individuals from SLAPP suits. See generally LIBEL DEFENSE RESOURCE CENTER, 50 STATE SURVEY 1998-99: MEDIA PRIVACY AND RELATED LAW (1998).

116. See *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 524-25 (N.D. Ill. 1990) ("A SLAPP suit is one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.").

117. See *id.* at 526 (holding that defendant in SLAPP suit was immune from liability under the right to petition).

suits is typically to establish a procedure for the early dismissal of such suits and for the imposition of costs upon the plaintiff.¹¹⁸ In defining the exercise of the right to petition, Massachusetts, for example, includes:

[A]ny written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.¹¹⁹

The need to protect informal acts of petitioning is, therefore, recognized by the States as well.

The protection of informal acts of petitioning, however, is in part responsible for the confusion surrounding the current attitude towards petitioning because it blurs the line between petitioning and speech. As discussed above, when the right to petition has been invoked by the Supreme Court, more often than not it is in the same breath as freedom of speech.¹²⁰ In fact, the Court has stated that "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression."¹²¹ This confusion is understandable because some types of publicity and public relations campaigns are considered "petitioning" and not simply speech.¹²² Moreover, it is also understandable given that the right to petition is no longer the only protected avenue for seeking political change or criticizing government. The First Amendment now guarantees a wider range of freedom of expression than was recognized during petitioning's golden era. Likewise, the rise of popular

118. See, e.g., MASS. GEN. LAWS. ch. 231, § 59h (West. Supp. 1999).

In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) that the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) that the moving party's acts caused actual injury to the responding party. . . .

Id.

119. *Id.*

120. See Rydstrom, *supra* note 18.

121. McDonald v. Smith, 472 U.S. 479, 482 (1985).

122. But see Spanbauer, *supra* note 18, at 66 (arguing that the extension of petitioning immunity to such efforts is overinclusive).

sovereignty and universal suffrage broadened the accepted means for political participation. The extension of these other rights, however, should not obscure petitioning's continued importance. The right to petition remains the principal textual guarantee of the individual's right directly to seek government action and for immunity from prosecution for those efforts.

C. *The Problem*

Against this backdrop, an argument could be made that parties involved in an objectively reasonable lawsuit who enter into a settlement agreement with anticompetitive consequences, are nonetheless, immune because the agreement is incidental to their Constitutionally protected right to petition the government for redress. In making this argument, litigants would find support in the Ninth Circuit's decision in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*¹²³ In that case, the court held that "[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability."¹²⁴ So long as the litigation itself is not a sham and entitled to immunity, any settlement would likewise be immune.

Second, litigants could point to the fact that, as a general rule, the antitrust laws do not preclude settlement by agreement rather than by litigation,¹²⁵ and emphasize the "general policy favoring settlement of litigation."¹²⁶ Lastly, at least one commentator has argued that "[t]oo great a willingness to find antitrust violations in settlement arrangements would significantly inhibit settlements of many types of cases at real cost to the administration of justice, with little likelihood of any countervailing benefit to the public interest."¹²⁷ In other words, denying immunity in the context of settlements would impose significant costs upon society either through the increased transaction costs associated with litigation or by limiting the ability of private actors to order their affairs. Despite the facial plausibility of this argument, a more probing examination of the right to petition reveals that the settlement of litigation is not the sort of activity that the right protects.

II. DEFINING THE SCOPE OF PETITIONING IMMUNITY

In order to determine whether the settlement of litigation is an activity that falls outside the protection of the First Amendment's right to petition, an understanding of the scope and limits of petitioning immunity is necessary. However, as noted by numerous commentators, this area of law is replete with

123. 944 F.2d 1525 (9th Cir. 1991).

124. *Id.* at 1528.

125. *See* *Standard Oil Co. v. United States*, 283 U.S. 163, 171 (1931).

126. *United States v. Singer Mfg. Co.*, 374 U.S. 174, 199 (1963) (White, J., concurring); Dore, *supra* note 16, at 290-91. *But see* Owen M. Fiss, *Against Settlements*, 93 YALE L.J. 1073 (1984) (criticizing the movement towards alternative dispute resolution).

127. Reasoner & Adler, *supra* note 8, at 126.

“doctrinal confusion”¹²⁸ as a result of the Supreme Court’s “failure to set forth clear general rules for defining the scope of the immunity.”¹²⁹ Currently, the clearest guidance provided by the Court is that the scope of *Noerr* immunity depends upon “the source, context, and nature of the anticompetitive restraint at issue.”¹³⁰ In dissent, Justice White noted that under this rule, “[D]istrict courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.”¹³¹ To flesh out this rule, this section examines the underlying premises of the *Noerr* doctrine and articulates some general rules and a methodology for determining the scope of petitioning immunity.

Despite the general ambiguity surrounding *Noerr*, the history of the right to petition and the Supreme Court’s case law demonstrate that immunity is justified based upon the nature of the activity in question and the source of the injury to competition. This Article proposes that immunity attaches when:

- 1) the conduct represents valid petitioning. Valid petitioning is defined as a formal or informal attempt to persuade an independent governmental decision maker consistent with the rules of the political forum in question, and
- 2) any anticompetitive harms flow directly or indirectly from those persuasive efforts.

Under this means/source test, the Supreme Court recognizes that: 1) individuals have a constitutional right to petition government for any end, and 2) the antitrust laws do not apply when restraints upon trade are a) the result of government action, or b) result directly from the act of petitioning.¹³² Immunity under *Noerr* is justified in circumstances in which both of prongs of the means/source test are satisfied.¹³³ Moreover, if these requirements are not satisfied, conduct is not immune even if “genuinely aimed at procuring favorable government action”¹³⁴ and therefore not a sham.¹³⁵

128. E.g., McGowan & Lemley, *supra* note 9, at 298.

129. Elhauge, *supra* note 9, at 1178.

130. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988).

131. *Id.* at 513 (White, J., dissenting).

132. See discussion *infra* Part II.A & Part II.B.

133. See discussion *infra* Part II.A & Part II.B.

134. *Allied Tube*, 486 U.S. at 500 n.4. Additionally, *Noerr* immunity is based implicitly on at least two assumptions. First, the process in which the anticompetitive result is being advocated is open to all sides. Second and closely related to the first, the outcome of the allegedly immunized activity must be subject to revision and reconsideration. Both of these assumptions are closely rooted to the political nature of the right. Harm to competition cannot be legitimately attributed to government, if those who are injured or simply oppose the “harm” do not have an avenue for being heard, and government cannot subsequently alter the outcome if it is inconsistent with the public good or any other reason.

135. See *infra* text accompanying notes 142-45.

A. The Means

Logically, the first step in determining whether the challenged activity is insulated under the First Amendment's right to petition is to determine whether the activity can be considered protected petitioning.¹³⁶ Historically, this would have meant a formal act of submitting a petition to a governmental body, in the appropriately deferential tone, seeking the redress of some public or private issue, separate from the cognate acts of speech and assembly.¹³⁷ However, as the prior summary of the Supreme Court's original trilogy in this area reveals, the Court has recognized that petitioning encompasses other means of communication in addition to the formal act of petitioning in the 18th century sense.¹³⁸ The right to petition extends to all valid efforts to solicit "governmental action with respect to the passage and enforcement of laws" whether they be formal or informal.¹³⁹ The threshold inquiry under *Noerr*, therefore, requires a determination that the private conduct represents an effort to solicit government action and that the means employed are considered valid.¹⁴⁰

At the outset it should be noted that determining whether the means are valid and therefore protected petitioning is not necessarily equivalent to determining whether the motives are genuine. If private action is not genuinely aimed at soliciting governmental action, it is considered a sham, and therefore unprotected by the First Amendment even if the means utilized would otherwise be considered valid for purposes of petitioning.¹⁴¹ Correspondingly, however, a genuine motive to "procure favorable governmental action" will not insulate private action if the means employed are not protected. As the Supreme Court made clear in *Allied Tube* and *Federal Trade Commission v. Superior Court*

136. Some commentators and courts have treated this question as a determination into whether the conduct in question is a sham. See, e.g., AREEDA & HOVENKAMP, *supra* note 90, at 19 ("Some courts and commentators use [sham] as a catchall for any activity that is not afforded *Noerr* protection."); Minda, *supra* note 10, at 1013-15 (arguing for the sham exception to include methods that distort the deliberative process of government). However, as discussed earlier, sham conduct has been narrowly defined to circumstances in which the private actor does not genuinely intend to secure governmental assistance. See *supra* notes 90-96 and accompanying text. Accordingly, the sham category is both over inclusive and underinclusive. Moreover, it fails to provide any substantive guidance into what activities should be protected under the First Amendment.

137. See *supra* Part I.A; see also Mark, *supra* note 18, at 2170-74.

138. See *supra* text accompanying notes 107-19.

139. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

140. See Elhauge, *supra* note 9, at 1215-23 (noting the need to determine whether the restraint is incidental and valid) (relying upon *Allied Tube*).

141. See *Professional Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1992) (defining sham); *Allied Tube & Conduit Corp. v. Indiana Head, Inc.*, 486 U.S. 492, 500 n.4 (1988).

Trial Lawyers Ass'n,¹⁴² protection under the right to petition may be denied even if the conduct in question was, in fact, intended and successfully results in government action.¹⁴³

But what exactly is protected petitioning? What means for soliciting government action are valid? As the following discussion demonstrates, the method for determining whether private conduct represents valid petitioning is a two step process. First, courts must determine the "nature" of the conduct in question—is the conduct primarily an effort to persuade an independent governmental decision-maker? If so, the next step is to determine whether that conduct is otherwise permissible within the rules of the political arena in which the petitioning is occurring without reference to antitrust.¹⁴⁴ Specific conduct that is considered acceptable varies depending upon whether the legislative, executive, or judicial branches are involved. Therefore, as the Supreme Court has recognized, context is crucial. A detailed analysis of cases from the Supreme Court's original trilogy as well as subsequent cases brings this initial two part inquiry into sharper focus.

1. *Is the Petitioning Valid?*—As discussed earlier, the *Noerr Motor Freight* decision examined the struggle between railroads and the heavy trucking industry. The trucking industry contended that the railroads conspired "to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers."¹⁴⁵ The complaint alleged that this campaign was conducted through unethical and fraudulent means including the circulation of material which appeared to be spontaneously expressed views of independent persons and groups when, in fact, they were produced by and for the railroads.¹⁴⁶ The truckers claimed that, as a result of this conduct, they sustained damages in the form of lost revenue when the Governor of Pennsylvania vetoed legislation favorable to trucking and by incurring costs in responding to the publicity effort.¹⁴⁷ In response, the railroad counter-claimed, among other things, that the truckers engaged in similar publicity and through similarly unethical and fraudulent means.¹⁴⁸ Despite finding that both sides had engaged in similarly deceptive publicity, the trial court found for the truckers and against the railroad based upon evidence that the railroads intended to harm trucking while the truckers were merely seeking self-serving legislation.¹⁴⁹

142. 493 U.S. 411 (1990).

143. See *infra* text accompanying notes 188-225.

144. Cf. AREEDA & HOVENKAMP, *supra* note 90, at 73-82; Elhauge, *supra* note 9, at 1223-35.

145. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129 (1961).

146. See *id.* at 130.

147. See *id.* at 130-31.

148. See *id.* at 132.

149. See *id.* at 134.

In finding the railroads' conduct immunized from antitrust scrutiny, the Court began with the proposition that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."¹⁵⁰ The Court noted that:

In a representative democracy such as this, [the] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity¹⁵¹

Accordingly, with due consideration for the right to petition, the Court held that "activities [which] comprised mere solicitation of governmental action with respect to the passage and enforcement of laws" would be immune from antitrust scrutiny.¹⁵² Because there was no question in *Noerr* that the "nature" of the railroads' activities, the publicity campaign, was in fact an effort to influence governmental decision-making (an effort that was at least in part a successful), the Court was not confronted with whether petitioning was involved. As the Court noted in its subsequent decision in *Pennington*, the evidence in *Noerr Motor Freight* consisted "entirely of activities of competitors seeking to influence public officials."¹⁵³ However, that did not end the inquiry, and the decision went on to address whether the intent behind the petition and the means employed were "sufficient to take the case out of the area in which the principle is controlling."¹⁵⁴

First, the Court rejected the district court's conclusion that the railroads' purpose of seeking to destroy their competition through legislation was somehow impermissible. According to the Court:

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.¹⁵⁵

This passage is important because the Court found that no rules or laws outside of antitrust prohibited petitioning based upon the intent of the petition, and therefore, a "bad motive" would not be sufficient to remove immunity for the

150. *Id.* at 135.

151. *Id.* at 137.

152. *Id.* at 138.

153. *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

154. *Noerr Motor Freight*, 365 U.S. at 138.

155. *Id.* at 139.

railroads' petitioning activity.¹⁵⁶

Next, the Court went on to reject the contention that the "deception" involved in the publicity campaign was sufficient to subject the conduct to antitrust scrutiny. While the Court found the practices to fall "far short of the ethical standards generally approved in this country," the technique employed by the railroads (and the trucking industry) was apparently "in widespread use among practitioners of the art of public relations" at the time.¹⁵⁷ Once again, in the absence of any rule prohibiting the use of the so called "third-party technique," the Sherman Act could not prohibit such conduct. To use the Court's language, "Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity."¹⁵⁸ Accordingly, beginning with *Noerr*, the Court examined both whether the conduct in question could be considered petitioning, and if so whether the petitioning activity was consistent with the rules of the "political arena" in which it occurred.

Following *Noerr*, the Court next examined the means of petitioning in two cases involving the judicial arena: *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*¹⁵⁹ and *California Motor Transport Co. v. Trucking Unlimited*.¹⁶⁰ Unfortunately, neither opinion is very detailed, and both fail to provide a coherent explanation for why petitioning immunity was denied in each instance. Nonetheless, both decisions can be readily explained by the fact that the petitioning conduct, the filing of a lawsuit, violated rules and norms within the judicial arena without reference to antitrust laws.

Rather than concluding that the truckers' litigation efforts were a sham, *California Motor Transport* is better understood as recognizing that while their conduct represented petitioning, it was invalid petitioning under the rules governing adjudication. As discussed earlier, *California Motor Transport*, involved allegations that certain trucking companies had violated the Clayton Act by conspiring to "institute state and federal proceedings to resist and defeat applications" by their competitors to acquire competing trucking rights.¹⁶¹ In that decision, the Supreme Court made clear that access to courts and administrative agencies were clearly protected by the right to petition.¹⁶² Despite that conclusion, the Court nonetheless found against the interstate truckers for filing their claims against the intrastate truckers even though they had a "right of access to the agencies and courts to be heard on applications sought by competitive

156. In so doing, the Court also appears to imply that even if such a rule did exist it would impermissibly interfere with the right to petition. See *id.*

157. *Id.* at 140.

158. *Id.* at 140-41.

159. 382 U.S. 172 (1965).

160. 404 U.S. 508 (1972).

161. *Id.* at 509.

162. See *id.* at 510.

highway carriers.”¹⁶³

Nominally, the Court concluded that because the complaint alleged that the interstate truckers instituted proceedings “with or without probable cause, and regardless of the merits of the cases,”¹⁶⁴ the alleged conduct fell within the sham exception. The Supreme Court reached this conclusion despite the fact that the truckers had been successful in the majority of their challenges winning twenty-one out of forty cases.¹⁶⁵ Given the defendant’s successes, as Professor Elhauge observed, “[I]t could not be denied that the suits were genuine efforts to influence adjudicators.”¹⁶⁶ Nor could it be argued that the claims raised were objectively without merit as required under the Supreme Court’s most recent definition of sham.¹⁶⁷ Accordingly, the conduct in *California Motor* does not satisfy the doctrinal definition of sham as it is understood today.

California Motor can best be understood as concluding that while the means used by the defendants were unquestionably petitioning, as alleged they could nonetheless be considered invalid under the rules of administrative and judicial proceedings. In an effort to distinguish the fact that in *Noerr* the railroads used deception, misrepresentation, and unethical tactics to secure favorable legislation, the Court emphasized the context of the activity at issue. While unethical conduct may be permitted in the political arena, “unethical conduct in the setting of the adjudicatory process often results in sanctions.”¹⁶⁸ For example, “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”¹⁶⁹ While *California Motor* did not involve perjury or other misrepresentations, it potentially involved the common law tort of abuse of process which would be impermissible without reference to antitrust laws or principles.¹⁷⁰ Because conduct such as perjury, fraud, and abuse of process are prohibited in the judicial arena, they “cannot acquire immunity by seeking refuge under the umbrella of ‘political expression.’”¹⁷¹ In other words, conduct inconsistent with the rules governing adjudicative proceedings would not be considered valid or protected petitioning activity.

Similarly in *Walker Process*, the Supreme Court examined whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office

163. *Id.* at 513.

164. *Id.* at 512.

165. *See* *Trucking Unlimited v. California Motor Transport Co.*, 1967 Trade Cas. (CCH) ¶ 72,298, at 84,744 (N.D. Cal.), *rev’d on other grounds*, 432 F.2d 755 (9th Cir. 1970), *aff’d on other grounds*, 404 U.S. 508 (1972).

166. Elhauge, *supra* note 9, at 1184.

167. *See* *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993).

168. *California Motor Transport*, 404 U.S. at 512.

169. *Id.* at 513.

170. *See id.*

171. *Id.* at 513.

could form the basis for a Sherman Act violation.¹⁷² In finding that the antitrust claim could proceed, the Court relied upon a well established body of patent law involving the invalidity of patents procured by fraud which recognizes that the validity of patents is always subject to attack.¹⁷³ "The far-reaching social and economic consequences of a patent . . . give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope."¹⁷⁴ Consequently, the Court concluded that if the plaintiff, Food Machinery, obtained its patent by knowingly and willfully misrepresenting facts to the Patent Office, it would not be immune from the antitrust laws.¹⁷⁵ "By the same token, Food Machinery's good faith would furnish a complete defense."¹⁷⁶ In the former case, a plaintiff knows or should know that the patent is invalid as a matter of law and, therefore, subsequent efforts to maintain and enforce that patent against others would have no objective legal basis. While some may label this conduct a sham¹⁷⁷ because the plaintiff would certainly be seeking government action in its favor (i.e., the enforcement of the patent against a competitor), denial of immunity is better understood as based upon the unprotected status of the alleged petitioning conduct. Accordingly, even though the Court's decision does not even mention *Noerr*, its conclusion is consistent with the principle that petitioning immunity only attaches when the petitioning conduct is considered valid.

Outside the context of antitrust, the Supreme Court's decision in *McDonald v. Smith*¹⁷⁸ is also consistent with examining whether the challenged petitioning conduct was considered valid. The defendant in *McDonald* sent letters to President Reagan, Presidential Advisor Edwin Meese, Senator Jesse Helms, and other public officials opposing the plaintiff's consideration for the position of United States Attorney.¹⁷⁹ The letters accused the plaintiff of violating the civil rights of individuals while serving as a state court judge, committing fraud, conspiring to commit fraud, extortion and blackmail, and other violations of professional ethics.¹⁸⁰ Following the rejection of his nomination, the plaintiff sued for libel.¹⁸¹

On appeal, the Supreme Court was asked to determine whether the statements made in the defendant's letters should be entitled to absolute

172. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 173 (1965).

173. *See id.* at 176-77.

174. *Id.* at 177 (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 816 (1945)).

175. *See id.*

176. *Id.*

177. *See AREEDA & HOVENKAMP, supra* note 90, ¶ 204.1, at 74-76; Minda, *supra* note 10, at 971-72.

178. 472 U.S. 479 (1985).

179. *See id.* at 481.

180. *See id.*

181. *See id.*

immunity or subject to the qualified immunity afforded by the constitutional malice standard recognized in *New York Times Co. v. Sullivan*.¹⁸² In determining the scope of immunity to be afforded to the defendant's petitioning efforts, the Court began by noting the historical significance of the right and that it "is implicit in '[t]he very idea of government, republican in form.'" ¹⁸³ The historical importance of the right, however, was not dispositive.¹⁸⁴ Instead, the Court examined whether the common law of defamation recognized absolute immunity for letters to public officials, noting that the authorities on that subject were mixed and that it had rejected a claim for absolute immunity in a prior defamation decision.¹⁸⁵ In light of this case law, the Court concluded that absolute immunity was not justified, and that the statements made in the letters could lead to liability if the plaintiff satisfied the *New York Times* standard and demonstrated that they were made with knowing or reckless disregard for the truth.¹⁸⁶ In support of its conclusion that some limitations on petitioning are legitimate, the Court relied on its "decisions interpreting the Petition Clause in contexts other than defamation" including *California Motor Transport* which did not "indicate that the right to petition is absolute."¹⁸⁷

2. *Is the Conduct Petitioning?*—In the preceding cases the nature of the private conduct was admittedly petitioning activity: lobbying, a publicity campaign directed at public officials, the filing of lawsuits, and instituting administrative proceedings. The question, therefore, was whether those petitioning activities were conducted in accordance with the rules and procedures of the petitioning forum, and, therefore, valid. In the following two cases, the Supreme Court confronted which types of conduct could in fact be considered petitioning, let alone valid petitioning.

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,¹⁸⁸ manufacturers of steel conduits used to house electrical wiring conspired with other steel interests to exclude plastic conduits from the National Electric Code. The Code, published by the National Fire Protection Association (a private organization representing industry, labor, academia, insurers, organized medicine, firefighters, and government), establishes product and performance requirements for electrical wiring.¹⁸⁹ State and local governments routinely adopted the Code with

182. See *id.* at 481-82.

183. *Id.* at 482-83 (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)).

184. See *id.* at 483 ("Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel.").

185. See *id.* at 483-84. But see Smith, *supra* note 18, at 1183 (arguing that the Supreme Court's analysis was flawed and that common law did recognize absolute immunity for letters to public officials); Spanbauer, *supra* note 18, at 52-58 (same).

186. See *id.* at 485 ("The right to petition is guaranteed; the right to commit libel with impunity is not.").

187. *Id.* at 484.

188. 486 U.S. 492, 497 (1988).

189. See *id.* at 495.

little or no revisions, and private industry often required electrical products to be consistent with the Code.¹⁹⁰

The controversy began when manufacturers of plastic conduits sought to have their conduits included as an approved type of electrical conduit in the 1981 edition of the Code. As described by the Supreme Court:

Alarmed that, if approved, respondent's product might pose a competitive threat to steel conduit, petitioner, the Nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude respondent's product from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the [plastic conduit] proposal.¹⁹¹

To that end, they recruited 230 persons to join the Association and paid over \$100,000 in expenses for these recruits. The strategy was successful and, while unethical, apparently was not prohibited by the Association's rules.¹⁹² Allied Tube subsequently brought an antitrust action seeking damages for injuries resulting from the exclusion of plastic conduits by the Code itself, but not for any injuries stemming from the adoption of the Code by governmental entities.¹⁹³

Beginning with the now accepted proposition that "[c]oncerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability," Justice Brennan, writing for the Court, stated that the "scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue."¹⁹⁴ Because Allied Tube was not seeking damages for the governmental adoption of the Code, any injury to competition arose from private action as opposed to governmental action. Under those circumstances, the Court stated that "the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity."¹⁹⁵ The central issue in *Allied Tube*, therefore, was whether the defendant's conduct represented petitioning—a valid effort to influence governmental action.

For the purposes of its analysis, the Court accepted the defendant's arguments that efforts to influence the Association's standards-setting process represented the most effective means of influencing legislation and that any effect the Code had in the marketplace of its own force was, in general, incidental

190. See *id.* at 495-96.

191. *Id.* at 496.

192. See *id.* at 497.

193. See *id.* at 498.

194. *Id.* at 499.

195. *Id.* (construing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 143 (1961)).

to a genuine effort to influence governmental action.¹⁹⁶ As such, there was no issue that the defendant was not genuinely attempting to influence government. Accepting these arguments, however, did not end the inquiry. According to the Court:

We cannot agree with [the] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. . . . Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms.¹⁹⁷

The method in which the defendant attempted to influence government, therefore, was critical in determining whether petitioning immunity would be recognized.

Given the context and nature of the activities, the Court ultimately concluded that *Noerr* immunity did not apply. The Court stated that “[w]hat distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner’s activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.”¹⁹⁸ In other words, the private conduct in *Allied Tube* was not simply petitioning but, instead, commercial conduct. First, the context of the conduct in question was the standard-setting process of a private association which the courts have traditionally examined because of their independent potential to restrain trade.¹⁹⁹ As the Court stated, an “agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products,” and, therefore, a classic example of a restraint upon trade.²⁰⁰ Because the conduct occurs in a private forum in which the actors have economic incentives to restrain trade, it is a far cry from an open political arena in which divergent viewpoints may be heard.²⁰¹

Along those same lines, the nature of the activity at issue could not be classified as an effort to persuade “an independent decision-maker.” Instead, the defendant “organized and orchestrated the actual exercise of the Association’s decision-making authority in setting the standard.”²⁰² The Association’s rejection of plastic conduits was not accomplished through debate and discussion on the

196. See *id.* at 502.

197. *Id.* at 503.

198. *Id.* at 505.

199. See *id.* at 500, 504.

200. *Id.* at 500.

201. See *id.* at 506-07.

202. *Id.* at 507.

merits. Rather, the steel industry packed the Association meeting with paid agents whose only role was to vote against plaintiff's proposal. The steel companies paid individuals to become members of the Association, paid for their expenses, instructed them where to sit, and instructed them when to vote.²⁰³

In reaching this conclusion, the Court emphasized that subjecting this type of behavior to antitrust scrutiny in no way diminished the defendant's ability to engage in actual petitioning against plastic conduits. According to the Court, "[P]etitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression."²⁰⁴ Additionally, defendant could take advantage of the forum provided by the association "by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body."²⁰⁵ While this latter approach would not be immune from antitrust scrutiny, it might deflect antitrust liability under the rule of reason.²⁰⁶

As a result, even though the defendant genuinely intended to influence governmental action, was in fact successful in obtaining governmental action, and accomplished its objectives without violating any rules of either the Association or the legislative arena, the Court concluded that its activities were not insulated from antitrust scrutiny. It did so because the defendant's conduct did not represent petitioning. At best it could be characterized "as commercial conduct with a political impact."²⁰⁷ At worst, it was a purely selfish economic decision accomplished through the exercise of raw market power. Either way, it was not protected by the right to petition.

Petitioning immunity also turned on the nature of the private conduct in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*.²⁰⁸ Once again, the Court was confronted with the issue of whether the conduct in question could be considered petitioning. In *Superior Court*, approximately 100 lawyers who regularly represented indigent defendants in the District of Columbia sought an increase in the hourly rates paid under the District of Columbia Criminal Justice Act (CJA).²⁰⁹ The CJA lawyers employed a three-fold strategy. First, they prepared and signed a petition seeking an increase in the hourly wages; second, they agreed to refuse any new CJA assignments until they received their raise; and third, they arranged a series of events to publicize their plight.²¹⁰ As a result of the collective decision to stop taking cases, the District's criminal justice system was eventually overwhelmed, prompting the Mayor to agree to an

203. See *id.* at 497.

204. *Id.* at 510.

205. *Id.*

206. See *id.* at 500-01.

207. *Id.* at 507.

208. 493 U.S. 411 (1990).

209. See *id.* at 415-16.

210. See *id.* at 416.

increase in CJA rates as demanded.²¹¹

In response, the Federal Trade Commission (FTC) filed a complaint against the lawyers arguing that they had engaged in unfair methods of competition through “a conspiracy to fix prices” and conducting a boycott.²¹² It should be noted at the outset that the FTC did not claim that the formal act of petitioning itself or the publicity efforts violated the antitrust laws. The Supreme Court stated that “[i]t is, of course, clear that the association’s efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation . . . were activities that were fully protected by the First Amendment.”²¹³ Accordingly, the sole issue before the Court was whether the boycott itself was protected by the First Amendment.

Although the boycott certainly represented an effort to influence government, the Supreme Court concluded that the boycott was not protected petitioning. According to the Court, this issue was “largely disposed of” by *Allied Tube*, in which the Court explained that *Noerr* does not protect every effort genuinely intended to influence government. Otherwise, “[h]orizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators’ terms.”²¹⁴ The CJA boycott was a horizontal agreement among competitors that was unquestionably “a ‘naked restraint’ on price and output.”²¹⁵ As explained by the appellate court, the constriction in price created by the boycott is the “essence of ‘price-fixing,’ whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.”²¹⁶

The Supreme Court also rejected the argument that the boycott was protected speech. Although the Court in *NAACP v. Claiborne Hardware Co.*²¹⁷ recognized some First Amendment protection for boycotts seeking to vindicate constitutional rights, it did so “[o]nly after recognizing the well settled validity of prohibitions against various economic boycotts”²¹⁸ In general, the regulation of economic boycotts only incidentally effects the rights of speech and association. Accordingly, the government has “power to regulate [such] economic activity,” especially when a clear objective of the boycott is economic gain for the participants.²¹⁹ In the Court’s view, the boycott represented economic rather than

211. See *id.* at 417-18.

212. *Id.* at 418.

213. *Id.* at 426.

214. *Id.* at 425 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988)).

215. *Id.* at 423.

216. *Id.*

217. 458 U.S. 886 (1982).

218. *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 428 (citing *Claiborne Hardware*, 458 U.S. at 912).

219. *Id.*

political activity.

Another way to interpret *Superior Court* is to recognize that with the boycott, the CJA attorneys had gone beyond merely attempting to persuade an independent decision-maker. Instead of limiting their efforts to persuading the District through the presentation of facts and arguments or through public pressure, the attorneys used the boycott to economically coerce the government into action. This distinction is made clear by Justice Brennan's opinion.²²⁰ According to Justice Brennan:

The Petition and Free Speech Clauses of the First Amendment guarantee citizens the right to communicate with the government, and when a group persuades the government to adopt a particular policy through the force of its ideas and the power of its message, no antitrust liability can attach. . . . But a group's effort to use market power to coerce the government through economic means may subject the participants to antitrust liability.²²¹

This distinction between persuasion and coercion is clearly consistent with the historical origins of the right to petition. Historically, petitions were rejected by the King and Parliament if their requests for government action were not sufficiently deferential.²²² If a petition could be rejected because its request was not sufficiently deferential, demands and coercion would certainly be refused. Today, while the acceptance of popular sovereignty has changed the relationship between the people and government, unless the people are acting in their sovereign capacity, public questions are to be resolved by government through a representative and deliberative process.²²³ Coercion, like the right to instruct representatives, necessarily undermines the deliberative process.²²⁴ Consequently both *Allied Tube* and *Superior Court* stand for the proposition that while various efforts to persuade an independent governmental decision maker are protected

220. Justice Brennan agreed with the majority that the boycott was not insulated from antitrust scrutiny either as petitioning or speech. His disagreement with the Court was over whether the conduct must necessarily lead to antitrust liability. See *id.* at 437 (Brennan, J., concurring in part and dissenting in part). In his opinion, although the expressive component of an economic boycott did not render the boycott absolutely immune, it cautioned in favor of applying the rule of reason to determine whether the boycott achieved its objective through political persuasion or through market power. See *id.* at 446.

221. *Id.* at 437-38.

222. See, e.g., Spanbauer, *supra* note 18, at 32 ("Early petitions presented by the colonies to England were composed with respectful language and began with expressions of the petitioners' subservience, loyalty, and support for the crown. Such petitions were the only authorized channel through which criticism of the government was funneled.").

223. See Ku, *supra* note 104, at 557-76 (discussing when constitutional change can legitimately claim to represent an act of popular sovereignty); Cass. R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (arguing that law making must be based on reasoned deliberation).

224. See *supra* text accompanying notes 35-39.

under the right to petition, efforts to dictate the result either directly through market power or indirectly through governmental coercion will be subjected to scrutiny.²²⁵

The means analysis employed by the Supreme Court examines whether the challenged conduct is in fact petitioning—an effort to persuade an independent governmental decision-maker through the presentation of facts and arguments. If the conduct is petitioning, a court must then determine whether that petitioning is valid according to the rules and procedures of the forum in which the activity occurs. This two-step examination ensures that the conduct in question does not subvert the political process and governmental accountability. As Professor Elhauge has noted, we allow private, financially interested actors to make important decisions about resource allocation in the market because free competition “causes producers to provide goods at the lowest cost to those who value them the most.”²²⁶ Under those circumstances, antitrust review ensures that those private “actions conform to this competitive process rather than undermine it to reap monopoly profits.”²²⁷ In contrast, we allow government to determine the public good even through restraints of trade because, in theory, its decision-making takes place in a political process with procedures that ensure that government remains accountable to the people.²²⁸ By determining whether the conduct represents persuasion rather than coercion and that the means employed are consistent with the rules and norms of the governmental forum, the means analysis protects both the individual’s right to petition and governmental accountability.²²⁹

B. *The Source of the Antitrust Injury*

In addition to the means employed, *Noerr* immunity depends upon the source

225. See also *Wigwam Assocs., Inc. v. McBride*, 24 Mass. Law. Wkly. S2 (Feb. 5, 1996) (Mass. Super. Ct. 1995) (holding that the “badmouthing” of a developer to prospective home buyers fell outside the context of petitioning government).

226. Elhauge, *supra* note 9, at 1197-98.

227. *Id.*

228. See *id.*

229. Professor Minda argues that the *Noerr* doctrine should be reconsidered in light of interest group theory because of the potential for business interests to capture the political process. See Minda, *supra* note 10, at 1027-28. Instead, he proposes that “courts should adopt a standard and an understanding of the first amendment that carefully limits petitioning activity of business when such activity is part of a profit-maximizing strategy for *monopolizing* markets, *regardless of context.*” *Id.* at 911. The problem with this approach is that it places too much faith in the judicial process and undervalues the role that petitioning and other political rights play in protecting against the very evil that concerns Professor Minda—unresponsive government. Instead of relying upon the political process to eliminate governmental capture, Professor Minda would rely upon judges to determine when business has gone too far. However, this approach elevates the policies embodied in antitrust laws to the level of constitutional law and overlooks the potential for judicial capture.

of the harm to competition. As the Supreme Court has noted, there is a "dividing line between restraints resulting from governmental action and those resulting from private action" ²³⁰ Presumably, private actors can not be held responsible for the former, while they are responsible for the latter. However, this distinction between public versus private action unnecessarily clouds the immunity analysis and provides an incomplete picture of petitioning immunity. Arguably, any time petitioning conduct is challenged as a violation of law the costs imposed upon competitors or other injuries to competition can be said to originate from private conduct or the original petitioning activity. Independent of the source of the ultimate restraint, the act of petitioning itself, whether it be the filing of a formal petition, a lawsuit, informal lobbying, or a publicity campaign, imposes costs on competition simply by requiring competitors to respond. ²³¹ Yet, immunity for these types of "injuries" is required even though they cannot be attributed to government. ²³² Moreover, petitioning immunity insulates private actors even when their petitioning efforts fail, and any resulting restraint upon competition clearly cannot be attributed to government. ²³³ Although the public/private distinction provides justification for immunity under certain limited circumstances, it hardly explains when and why protection should be granted in the vast majority of cases. Consequently, the question should not be whether the restraint can be attributed to public versus private decision-making. Instead, the source prong should focus on determining whether the restraint results from valid petitioning.

Unfortunately, the source of this doctrinal confusion stems from the Supreme Court's decision in *Noerr* itself. In justifying immunity, the Court stated that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." ²³⁴ This conclusion was required because "under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the

230. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

231. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 143-44 (1961).

232. *See id.*

It is inevitable, whenever an attempt is made to influence legislation . . . that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Id.

233. *See AREEDA & HOVENKAMP, supra* note 90, ¶ 201, at 16 ("Even if the proposed action is rejected and a rival has been burdened by being forced to oppose the measure or defend himself in a lawsuit, such a burden is the normal result of governmental processes and its imposition on a rival is not wrongful.").

234. *Noerr Motor Freight*, 365 U.S. at 136.

Constitution.”²³⁵ In support, the Court relied upon its decision in *Parker v. Brown*,²³⁶ in which it recognized state action immunity, or in other words, that the Sherman Act does not apply to state programs that impose unreasonable restraints upon trade. This reflects the understanding that a governmental decision to act “reflects an independent governmental choice, constituting a supervening ‘cause’ that breaks the link between a private party’s request and the plaintiff’s injury.”²³⁷ Along these lines, the Court characterized *Noerr* as merely a “corollary to *Parker*” required because it would be “peculiar in a democracy, and perhaps in derogation of the constitutional right ‘to petition the Government for a redress of grievances,’ . . . to establish a category of lawful state action that citizens are not permitted to urge.”²³⁸

Petitioning immunity is more than a mere corollary to state action immunity. As mentioned earlier in *Noerr*, the Court was not asked to consider whether the railroads could be held responsible for damages resulting from the Governor’s legislation of a bill favorable to the trucking industry, but instead whether the railroads could be held responsible for injuring the truckers’ relationships with their customers through their publicity campaign and costs incurred by the truckers in responding to that campaign with a publicity effort of their own.²³⁹ In other words, the truckers were seeking damages resulting directly from the act of petitioning rather than indirectly through governmental action.²⁴⁰

Nonetheless, the Court concluded that the petitioners were immune from liability for those direct injuries because they inevitably result from any effort to petition government, and “[t]o hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.”²⁴¹ In other words, the fact that customers may be lost because of a lawsuit or negative public relations campaign and that defendants will incur expenses in defending against a lawsuit or hiring lobbyists of their own, are inevitably associated with any effort to solicit government action. Holding a petitioner responsible for such costs simply because they are not caused by government would eviscerate the right to petition. Accordingly, in order to protect the act of petitioning itself, the Court concluded that petitioners could not be punished for any injuries resulting directly from protected petitioning activities. Because the Court concluded earlier that the conduct of the railroads satisfied the means prong as valid petitioning activity, it rejected the truckers’ claims.

A similar analysis was followed in both *Allied Tube* and *Superior Court*, even though in both cases the defendants were successful in obtaining governmental action in their behalf. In determining whether the defendant could

235. *Id.*

236. 317 U.S. 341 (1943).

237. AREEDA & HOVENKAMP, *supra* note 90, ¶ 201, at 14.

238. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991).

239. *See Noerr Motor Freight*, 365 U.S. at 133-34.

240. *See id.* at 143.

241. *Id.* at 143-44.

be held responsible for damages resulting from the exclusion of plastic conduits from the 1981 Code, the Court emphasized that "where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action."²⁴² Because the Court concluded that Indian Head's manipulation of the private standard setting association was not a valid petitioning effort, the Court held that its conduct was not immunized, and the defendant was held responsible for \$3.8 million in lost profits suffered by the plaintiff.²⁴³

Similarly, because the economic boycott in *Superior Court* was found to be an invalid means of petitioning, the CJA lawyers could be subjected to antitrust liability for the restraint upon trade resulting from their boycott. In particular, the Court noted that the restraint was not the "intended consequence of public action," but was "the means by which respondents sought to obtain favorable legislation," and that "the emergency legislative response to the boycott put an end to the restraint."²⁴⁴ Once again, because the defendants' conduct was not considered a valid means of petitioning, they were held responsible for the injury to competition directly resulting from that conduct. The critical question in the source prong, therefore, is whether the injury results from a valid effort to influence government, not whether the government or a private actor is the source of the harm, or whether the harm is characterized as direct or incidental.

When the alleged injury results not only from valid petitioning activities but from government's response to that petition, the argument for immunity is even stronger. Not only is the right to petition implicated, but the causal chain is broken by the decision of an independent, financially disinterested, public decision-maker.²⁴⁵ As the Supreme Court recognized, it is "beyond the purpose of the antitrust laws to identify and invalidate lawmaking" because it may have been infected by selfish motives.²⁴⁶ While this certainly adds an additional arrow to the defendant's quiver of immunity arguments, the pivotal question is whether the challenged conduct is considered valid petitioning. If the conduct is considered valid petitioning, the petitioner is immune from all liability, regardless of whether the injuries are caused by the defendant directly through the act of petitioning itself or indirectly by governmental adoption of the petitioner's position.²⁴⁷ In contrast, if the activity does not represent valid

242. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988).

243. *See id.* at 498.

244. *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990).

245. *See AREEDA & HOVENKAMP, supra* note 90, ¶ 201, at 14.

246. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991).

247. Some commentators have argued that given the importance of competitive economic policy in this country, *Noerr* immunity should be narrowly tailored, especially given the possibility for imposing considerable costs upon competitors directly through petitioning. *See, e.g.,* Hurwitz, *supra* note 7; Meyer, *supra* note 7. At least one commentator has argued that *Noerr* immunity should not be granted if the defendant's conduct is in effect not the least restrictive means for

petitioning, defendants are subject to antitrust scrutiny even if they are ultimately successful in obtaining governmental action. As such, the means/source test can be collapsed into a single inquiry: Is the private conduct a valid effort to influence government?²⁴⁸

III. THE METHODOLOGY APPLIED TO SETTLEMENTS

Having proposed a methodology for determining whether immunity is justified under the right to petition, the next step is to apply the analysis to the settlement of litigation. Because settlements vary in “source, context, and nature,” this section examines whether the right to petition immunizes purely private settlement agreements—those entered into between private litigants in which no court approval is sought or required.²⁴⁹ An analysis of private settlements under the means/source test clearly leads to the conclusion that such agreements are not protected by the right to petition.

When private parties enter into settlement agreements, the right to petition is not implicated. For the purposes of this discussion, private settlements are settlements arrived at between parties to the litigation in which dismissal of the action is accomplished by stipulation under Rule 41(a)(1) of the Federal Rules of Civil Procedure.²⁵⁰ Under those circumstances, judicial approval of the

achieving governmental action *and* the action sought is illegitimate. *See Meyer, supra* note 7, at 832. These arguments diminish the importance of the right to petition while elevating the values of free-market economics. The right to petition is guaranteed in our Constitution to ensure that government remains responsive to the people. If the people want to eliminate the Sherman Act, impose a command economy, or even eliminate government altogether, it is their prerogative to do so. Similarly, while it may make sense as a matter of economic policy to require defendants to choose the least costly means of petitioning government, such a requirement would impermissibly chill the right to petition by subjecting petitioners to SLAPP suits in which the government or private parties are allowed to second guess the means by which political or private change is sought.

248. By focusing on whether challenged conduct is valid petitioning without reference to antitrust laws or principles, the means/source test is equally useful for identifying conduct that falls under the protection of the right to petition when that conduct is alleged to have violated other laws.

249. Court approved settlement agreements or consent decrees in the context of: 1) voluntary dismissals under Rule 41 of the Federal Rules of Civil Procedure; 2) class action settlements under Rule 23 of the Federal Rules of Civil Procedure; and 3) government prosecutions under the Antitrust Procedures and Penalty Act, 15 U.S.C. § 16, are the subject of Part IV.

250. FED. R. CIV. P. 41(a)(1) provides:

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an

settlement agreement is neither required nor permitted.²⁵¹ While the antitrust laws do not preclude parties from entering into settlement agreements, that does not mean that those parties are necessarily absolved from any anticompetitive harm resulting from those agreements. Applying the means/source test to settlements demonstrates that such conduct should not be immune from antitrust scrutiny.

The first step in the means/source analysis is to determine whether the conduct in question can be considered petitioning.²⁵² Private settlements fail to satisfy this first prong because they are in fact the antithesis of efforts to solicit government action. While lobbying legislatures or public officials, conducting publicity campaigns, and filing lawsuits are all attempts to persuade an independent government decision-maker to adopt one's view, no similar claim can be made when private parties enter into a settlement agreement. When private parties enter into a settlement agreement, they are affirmatively withdrawing consideration of the matter from the decisionmaking authority of government. Under those circumstances, the parties are no longer attempting to persuade government to adopt a potentially anticompetitive policy, nor are they soliciting government action. Instead, they have officially given up any such effort and are acting on their own. As the nature of the conduct does not represent petitioning, there is no need to determine whether that petitioning activity was in accordance with the rules of the judicial forum. Consequently, private settlement agreements clearly fail the means prong of the *Noerr* analysis.

Even though failure of the means prong is sufficient to deny immunity, private settlement agreements also fail the source prong of the *Noerr* analysis.²⁵³ When private parties enter into a settlement agreement without judicial participation, any anticompetitive effects arising from the agreement can in no way be fairly attributed to valid petitioning activity. As the Supreme Court has recognized in another context, a settlement agreement is simply a contract, for which part of the consideration is the dismissal of a lawsuit.²⁵⁴ Given the private nature of these agreements, we can legitimately question whether the public's interests are being considered, let alone vindicated, by these private attorneys general.²⁵⁵ As recognized by Professor Fiss, "[T]he bargain is at best contractual and does not contain the kind of enforcement commitment already embodied in

action based on or including the same claim.

Id.

251. See 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 2363, at 270-72 (2d ed. 1994) [hereinafter *WRIGHT & MILLER*].

252. See *supra* Part II.A.

253. As discussed earlier, the means/source test can actually be collapsed into a single inquiry: does the private conduct represent valid petitioning. This, however, does not make the source prong irrelevant. There may be circumstances in which the conduct in question represents valid petitioning, but is not the source of the antitrust injury. The source prong, therefore, is necessary to protect competitors from injurious conduct not protected under the First Amendment.

254. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

255. See generally Fiss, *supra* note 126.

a decree that is the product of a trial and the judgment of a court.”²⁵⁶ Consequently, any resulting harm to competition finds its source in that contract and the market power wielded by the signatories.²⁵⁷ Under those circumstances, government action is not solicited, nor will it be unless a court is subsequently asked to enforce the terms of that contract in the event of a disagreement between the parties.²⁵⁸

Consequently, the central justifications for *Noerr* immunity are absent in the context of settlement agreements. This conclusion should be the same even if a court would have ordered the same remedy. “The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority.”²⁵⁹ Immunity from antitrust scrutiny or any other laws for that matter is not based upon whether the outcomes are acceptable or permissible, but depends upon the means used to achieve those outcomes.²⁶⁰ By withdrawing the matter from government consideration, parties to a private settlement agreement have steered a course outside the protection of the right to petition.

The conclusion that private settlement agreements are not insulated from antitrust scrutiny is consistent with existing case law. The only court decision on point is *In re New Mexico Natural Gas Antitrust Litigation*²⁶¹ that involved five antitrust lawsuits against various producers and suppliers of natural gas. The plaintiffs alleged that the defendants had engaged in price fixing in violation of the Sherman Act.²⁶² The price fixing was allegedly the result of the settlement of claims in a separate litigation brought by the producers of natural gas against the supplier.²⁶³ The separate litigation involved, among other things, the interpretation of “favored nations (or price equalization) clauses” in the contracts between the producers and the supplier.²⁶⁴ The defendants in the subsequent action claimed that the initiation, prosecution, and settlement of the earlier lawsuits were exempt from antitrust liability under the *Noerr* doctrine.²⁶⁵

The court disagreed and held that “a private settlement accomplished without Court participation should not be afforded *Noerr-Pennington* protection.”²⁶⁶

256. *Id.* at 1085.

257. Additionally, disparities in power between the parties may also lead us to question whether the terms of the agreement are even just between them. *See id.* at 1075-82 (noting that the settlement process may be infected by coercion, unequal bargaining power, and the absence of authoritative consent).

258. *See id.*

259. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-26 (1940).

260. *See supra* Part II.A.

261. No. 403, 1982 WL 1827 (D.N.M., Jan. 26, 1982).

262. *See id.* at *4.

263. *See id.*

264. *Id.* at *4 n.8.

265. *See id.* at *5.

266. *Id.* at *6.

According to the court:

When parties petition a Court for judicial action [Noerr] protection attaches, but when they voluntarily withdraw their dispute from the court and resolve it by agreement among themselves there would be no purpose served by affording Noerr-Pennington protection. The parties by so doing must abide with any antitrust consequences that result from their settlement. The defendants have pointed to no case which would afford Noerr-Pennington protection to private settlement of litigation, and logic would indicate no reason why there should be such protection.²⁶⁷

The court opined, however, that the result may be different when "the settlement was submitted to the Court and approved in an order of dismissal of the case."²⁶⁸ The defendants argued that because the settlement had been submitted and incorporated as part of the order of dismissal the settlement is immunized, while the plaintiffs argued that the sham exception would apply.²⁶⁹ The court declined to reach the issue at that stage of the litigation.²⁷⁰ The district court's decision in *In re New Mexico Gas*, therefore, clearly supports the conclusion that private settlements are not immune merely because the parties to the agreement have "voluntarily" withdrawn their request for governmental decision-making and acted on their own.

The FTC has also concluded that private settlement agreements are not exempt from antitrust scrutiny. In *In re YKK, Inc.*,²⁷¹ the FTC concluded that the terms of a settlement offer constituted unfair competition. The case involved competitors, YKK Incorporated and Talon Incorporated, who manufactured and sold zippers.²⁷² An attorney for YKK sent a letter accusing Talon of "unfair and predatory sales tactics" by offering free equipment to customers.²⁷³ Apparently, YKK offered to drop the matter if both agreed to stop providing free equipment.²⁷⁴ The Commission concluded that "[a]n agreement between Talon and YKK to cease this form of discounting would have constituted an unreasonable restraint of competition."²⁷⁵ The concurring opinion of Commissioner Deborah K. Owen notes that any agreement between YKK and Talon would have represented the settling of "allegations of unlawful price discrimination."²⁷⁶ The fact that the agreement would have represented such a

267. *Id.*

268. *Id.* at *7.

269. See *infra* Part IV for a discussion whether court approval of settlements justifies immunity.

270. See *In re New Mexico Natural Gas Litig.*, 1982 WL 1827, at *7.

271. F.T.C. 628 (1993).

272. See *id.* at 629.

273. See *id.*

274. See *id.* at 641 (concurring statement of Comm'r Starek).

275. *Id.* at 629.

276. *Id.* at 641.

settlement did not, however, prevent the FTC from scrutinizing its anticompetitive nature.

The context of private settlement, however, does not remove from antitrust scrutiny inherently suspect conduct that lacks an efficiency justification. In civil cases generally, a legitimate intent or purpose would not justify a restraint that has unreasonably anticompetitive effects. Moreover, even a good faith attempt to avoid Robinson-Patman liability will not excuse anticompetitive conduct that is clearly inconsistent with the broader purposes of the U.S. antitrust laws.²⁷⁷

Commissioner Starek also noted that even if YKK's invitation was a good faith offer of settlement, the terms of that settlement exceeded the scope of what was "reasonably necessary to achieve a settlement. The potential effects of such an invitation are unambiguously anticompetitive."²⁷⁸

Assuming *arguendo* that YKK's threats of litigation were made in good faith, the appropriate *quid pro quo* for the competitor's commitment to cease from engaging in the putative violation was YKK's commitment to forgo initiating litigation. YKK, however, went further, offering to discontinue an important form of discounting in exchange for the competitor's commitment to discontinue such discounting. This conduct poses a substantial threat to competition, particularly in cases such as this where the evidence strongly suggests that the relevant firms, acting in concert, have market power.²⁷⁹

Commissioner Starek concluded by stating that "competitors attempting to resolve claims of unlawful discounting under the Robinson-Patman Act [should] understand that any settlement or attempted settlement must pass scrutiny under U.S. antitrust laws forbidding unreasonable restraints of trade. . . ."²⁸⁰

Commissioner Dennis A. Yao, in his concurring statement, also stressed that YKK went beyond requesting that Talon cease any allegedly unlawful practices.²⁸¹ He stressed that:

Although the Commission must take care in cases like this to avoid any misimpression that mere settlement discussions could lead to a Section 5 action, the Commission cannot abdicate its responsibility to challenge an unlawful invitation to collude solely because it occurs during an otherwise lawful conversation.²⁸²

Both concurrences make clear that even good faith efforts at settling disputes and

277. *Id.* at 642 (footnote omitted).

278. *Id.* at 643.

279. *Id.* (footnotes omitted).

280. *Id.* at 643-44.

281. *See id.* at 645 (concurring statement of Comm'r Yao) ("Most importantly, the lawyer's actions here went beyond requesting that his client's competitor cease an allegedly unlawful practice . . .").

282. *Id.* at 646.

the agreements that arise from those efforts are subject to antitrust scrutiny. They also establish a rule, or at least a presumption, that settlement agreements represent unreasonable restraints if they require more than the cessation of the allegedly unlawful practice in exchange for not bringing or dismissing a lawsuit.

The only appellate court decision to touch upon this question is the Ninth Circuit's decision in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*²⁸³ In that case, the defendant in a private antitrust suit argued that the plaintiff's refusal to settle the litigation violated the antitrust laws.²⁸⁴ In rejecting this argument, the court stated that, "[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability."²⁸⁵ Because the Supreme Court held that beginning a lawsuit cannot be the basis for antitrust liability, the Ninth Circuit's holding that refusing to settle an ongoing lawsuit cannot form the basis for antitrust liability is not only consistent with that rule, but required. The rejection of a settlement offer represents nothing less than a decision to continue the petitioning effort. It would be strange indeed if the First Amendment protected the right to begin petitioning but not the right to continue to engage in petitioning conduct. Unfortunately, the same cannot be said for the court's dicta that a decision to accept a settlement is likewise insulated.

While the symmetry of "accept or reject" is facially appealing, it is not consistent with the overall thrust of *Noerr* immunity which, as discussed above, only applies: (1) to legitimate efforts to persuade the government as an independent decision-maker, and (2) when the alleged antitrust injury results from valid petitioning activity.²⁸⁶ With the exception of the unsupported dicta in *Professional Real Estate Investors*, the conclusion that private settlement agreements are not immunized by the right to petition is consistent not only with Supreme Court interpretation but also with the only decision to actually address the issue.

IV. THE METHODOLOGY APPLIED TO CONSENT DECREES

The main wrinkle in the argument that the settlement agreements are subject to antitrust scrutiny and not exempt under the First Amendment arises when the agreements are approved by a court and entered as consent decrees. As one court recognized, there is an argument that agreements approved by a court should have a different status under *Noerr* than purely private agreements.²⁸⁷

Judicial approval of settlements is required in several different contexts. First, under Rule 41 of the Federal Rules of Civil Procedure, judicial approval is

283. 944 F.2d 1525 (9th Cir. 1991), *aff'd on other grounds*, 508 U.S. 49 (1992).

284. *See id.* at 1528.

285. *Id.*

286. *See supra* Part III.A-B.

287. *See In re New Mexico Natural Gas Antitrust Litig.*, No. 403, 1982 WL 1827, at *7 (D.N.M., Jan. 26, 1982).

required when dismissal is sought unilaterally.²⁸⁸ Second, in class actions, a court must determine whether the entry of a judgment is in the public interest under Rule 23(e) of the Federal Rules of Civil Procedure.²⁸⁹ Lastly, under the Antitrust Procedure and Penalty Act, a court is authorized to enter a final judgment and consent decree only after the receipt of comments on the competitive impact of the proposed settlement and a judicial determination that the consent decree is in the public interest.²⁹⁰ Assuming that the parties would not abide by the terms of the settlement absent judicial approval and incorporation into a court order, it would be difficult to separate the source of the antitrust harm from government as opposed to private action. Court approval, however, still does not bring settlement agreements within the scope of the *Noerr* doctrine because, as the following discussion demonstrates, the First Amendment justifications are still absent. First, the conduct in question still does not represent an attempt to solicit government action. Second, even if seeking judicial approval of a private agreement could be considered petitioning, doing so to insulate anticompetitive conduct would not be considered valid petitioning.

A. *Non-petitioning Means*

Agreements approved by a court and incorporated into a judicial order should not be immunized for the same reasons that private settlements were not immune under the right to petition—the means associated with and culminating in the settlement do not represent petitioning. Whereas private settlement agreements clearly represent private contracts, consent decrees represent a hybrid between contract and judicial decree.²⁹¹ Despite the judicial involvement, the means employed in reaching the agreement are still the same as those used to enter into private settlement or any private commercial contract. Accordingly, the means used still do not represent an effort to solicit government action by presenting the merits of their claims for a judge to decide. The parties to the settlement are affirmatively withdrawing the merits of the decision from the judge and jury, and resolving the dispute among themselves to acquire “a bargained for arrangement

288. See FED. R. CIV. P. 41(a) & (b).

289. See *id.* Rule 23(e) (“A class action shall not be dismissed or compromised without the approval of the court . . .”).

290. See 15 U.S.C. § 16(e) (1994).

291. See *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148 (6th Cir. 1992) (“The consent decree is . . . ‘a voluntary settlement agreement which could be fully effective without judicial intervention’ and ‘a final judicial order . . . plac[ing] the power and prestige of the court behind the compromise struck by the parties.’” (quoting *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983))); Jed Goldfarb, *Keeping Rufo in Its Cell: The Modification of Antitrust Consent Decrees After Rufo v. Inmates of Suffolk County Jail*, 72 N.Y.U. L. REV. 625, 630 (1997) (“The prevailing modern view is that a consent decree is a hybrid, possessing attributes of both a contract and a judicial decree.”); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324 (1988) (noting the dominance of the hybrid view).

[which] more closely resembles a contract than an injunction.”²⁹² In so doing, the parties can be treated as orchestrating the decision-making process by privately negotiating the terms of the settlement and then presenting them to the court as a *fait accompli* which any court would be hard-pressed to reject.²⁹³ Settlement resolves the ongoing dispute before a court by depriving the “court of the occasion, and perhaps even the ability, to render an interpretation” of the law and the facts.²⁹⁴ Given that “[p]arties might settle while leaving justice undone,”²⁹⁵ the context and nature of judicially approved consent decrees is closer to the quintessential private economic agreement unprotected by the First Amendment and subject to antitrust scrutiny than a judicial decree following a trial on the merits.

Moreover, as demonstrated by both *Allied Tube* and *Superior Court*, subsequent governmental approval does not immunize otherwise non-petitioning conduct.²⁹⁶ Under these circumstances, court-approved settlements could be analogized to the conduct found wanting in *Allied Tube* where the producer of steel conduits orchestrated the decision-making process of the private association. As discussed earlier, the Supreme Court concluded that immunity was not justified even though the defendant actually sought government approval of the Code as adopted by the association, influencing the association was the most effective means of influencing government, and the defendant was successful in obtaining governmental approval in numerous instances.²⁹⁷ Similarly, in *Superior Court*, the Court found that the CJA attorneys’ boycott was not petitioning because it was a quintessential horizontal restraint of trade and an attempt to coerce governmental action rather than an effort to persuade on the merits.²⁹⁸ Even though parties to a lawsuit may genuinely seek governmental approval of the terms of their settlement and successfully obtain approval, the non-petitioning nature of their conduct should be sufficient to subject them to antitrust scrutiny.²⁹⁹

292. Fiss, *supra* note 126, at 1084.

293. See *id.* at 1085 (“A court cannot proceed (or not proceed very far) in the face of a settlement.”).

294. *Id.*

295. *Id.*

296. See *supra* text accompanying notes 188-225.

297. See *supra* text accompanying notes 188-207.

298. Although both cases may be distinguished because they dealt with conduct that independently imposed restraints of trade regardless of whether or not government acted and a proposed settlement would have no adverse impact on competition until it is approved by a court, the reasoning in both decisions is still applicable.

299. This does not mean that the parties’ actual presentation to the court for judicial approval cannot be considered protected petitioning, but rather that the prior acts of negotiating the settlement and ultimately the settlement itself would not be considered protected petitioning.

B. Invalid Means

Even assuming that asking a court to approve a settlement could nonetheless be considered petitioning and that the petitioning would include the act of negotiating and entering into the settlement itself, it is by no means clear that the petitioning would be considered valid if the parties are seeking judicial approval of the anticompetitive consequences of the settlement. First, as the following discussion demonstrates, judicial approval of settlement agreements does not usually represent judicial approval of the anticompetitive effects of the agreement. Second, in general, courts do not have the authority to immunize anticompetitive conduct. Under those circumstances, private parties know or should know that judicial approval does not mean approval of the anticompetitive consequences of their agreement, and their effort to claim authorization is therefore fraudulent. Furthermore, if the court specifically “approves” any resulting restraint upon trade, such approval is beyond the court’s authority. In either case, the petitioning activity would be considered invalid.

1. *Approval of What?*—To begin with, it is not necessary to assume that judicial “approval” of a settlement agreement represents government sanctioning of anticompetitive harm for the purposes of *Noerr* immunity. As the Supreme Court consistently reminds us, “Immunity from the antitrust laws is not lightly implied.”³⁰⁰ Determining whether a court can be said to have approved any restraint upon competition embodied in a settlement would be a necessary predicate to determining whether the agreement can be immunized as an effort to solicit valid governmental action.

In general, when asked to approve a settlement agreement, a court is not being asked to determine liability or approve the substance of the agreement. In fact, most agreements expressly deny any admission of liability. Consequently, the court is not being asked to enforce the law.³⁰¹ Nor is the court specifically being asked to approve the anticompetitive effects of the agreement. When the dismissal is accomplished by stipulation pursuant to Rule 41(a)(1), judicial approval is not required, and courts cannot impose additional conditions.³⁰² Unless the parties mutually agree to court approval, a district court is not even permitted to enter that the agreement “So Ordered.”³⁰³ Likewise, while Rule 41(a)(2) does require judicial approval when a party unilaterally moves for dismissal, approval under those circumstances merely represents a judicial determination that the non-moving party will not be prejudiced by the dismissal.³⁰⁴ Approval under Rule 41 is, therefore, at best limited to the conclusion that the agreement is fair with respect to the parties entering into the

300. *California v. Federal Power Comm’n*, 369 U.S. 482, 485 (1962).

301. *See Eastern RR. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (“[T]he Sherman Act does not apply to the . . . mere solicitation of governmental action with respect to the . . . enforcement of laws.”).

302. *See* WRIGHT & MILLER, *supra* note 251, at 270-72.

303. *Gardiner v. A.H. Robins, Co.*, 747 F.2d 1180 (8th Cir. 1984).

304. *See* WRIGHT & MILLER, *supra* note 251, at 278-79.

agreement. Consequently, the scope of judicial approval of settlement agreements under Rule 41 is exceptionally narrow, and the court is under no obligation, and arguably has no authority, to evaluate the anticompetitive effects of settlements.

While the judicial role in class actions is noticeably greater, its scope of review is likewise insufficient to justify antitrust immunity. Under Rule 23(e), a district court acts as a fiduciary guarding the rights of absent class members and the public in general.³⁰⁵ It cannot accept a settlement agreement that the proponents have not demonstrated to be "fair, reasonable, and adequate."³⁰⁶ However, "neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute."³⁰⁷ A court, therefore, does not have the power or the authority to review the underlying facts and law to determine whether a settlement violates the antitrust laws. "[U]nless, the terms of the agreement are per se violations of antitrust law," the court may only apply a reasonableness standard of review.³⁰⁸ As such, even in the context of Rule 23, judicial approval is quite limited.

In contrast to both Rule 41 and Rule 23, section 16 of the Antitrust Procedure and Penalty Act establishes detailed procedures for judicial review of anticompetitive harms resulting from consent decrees and specifically requires court's to determine whether such agreements are in the public interest.³⁰⁹ For example, the statute provides for publication of the terms of the proposed consent decree, publication of a competitive impact statement, written comments by the United States, publication of the procedures for modifying the proposed consent decree, and a requirement that the court determine that the entry of the consent decree is in the public interest considering the competitive impact of the judgment.³¹⁰ In making the public interest determination, the court is not limited to the parties before it, but may rely upon expert witnesses, appoint a special master, and authorize the participation of "interested persons."³¹¹ Unlike consent decrees entered under Rules 41 and 23, with section 16 agreements it would be possible to argue that court approval included approval of the anticompetitive consequences of the agreement. Not only is the court allowed to consider any restraint upon competition, it has a duty to make that inquiry, and cannot enter judgment unless it concludes that the agreement is in the public interest.

Petitioning immunity, however, would not apply with respect to consent decrees entered under section 16 for a very simple but very different reason.

305. See FED. R. CIV. P. 23(e).

306. *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

307. *Id.* at 123 (citations omitted).

308. *Id.* at 124.

309. See 15 U.S.C. § 16 (1994).

310. See *id.* § 16(b)-(f).

311. *Id.* § 16(e)-(f).

Section 16 only applies in cases brought by or on behalf of the United States.³¹² In other words, section 16 is limited to civil and criminal prosecutions. The defendants in such cases, therefore, are not exercising their right to petition, but are instead defending themselves from government prosecution. As demonstrated by the history of the right to petition, petitioning immunity exists to protect affirmative efforts to invoke governmental power. The right to petition government for redress is, therefore, not implicated under section 16 agreements. If immunity is to be granted under these circumstances it would be under the “state action” doctrine rather than petitioning.

Given the limited nature and authority of court “approval” under Rule 41 and Rule 23, it would be difficult to argue that judicial approval of a settlement represents approval of any potential restraint upon trade embodied in the settlement.

2. *The Limits of Judicial Approval.*—Moreover, in addition to questioning whether a court has in fact “approved” a restraint upon competition embodied in a consent decree, it is questionable whether a court has the power to give such approval. As a general matter, courts cannot enforce illegal agreements, and the Supreme Court has consistently held agreements that violate the antitrust laws unenforceable.³¹³ Consequently, petitioning immunity could be denied on the basis that asking a court to approve a settlement that restrained trade is an invalid form of petitioning under the rules governing the judicial system.

While there is some disagreement among the Justices as to the appropriateness of illegality as a defense to contract law,³¹⁴ there is universal agreement that courts cannot lend their authority to acts which would make “the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.”³¹⁵ The disagreements among the Justices and the exceptions to this rule involve cases in which the defense is raised by a defendant who has benefitted from a plaintiff’s performance under the challenged contract seeking to enjoy the benefits of that performance without the corresponding obligation to perform its part of the bargain.³¹⁶ In those cases, the disagreement among the Justices is not whether the courts may enforce agreements in violation of the

312. See *id.* § 16(b).

313. See, e.g., *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 79-80 (1982) (holding that a collective bargaining agreement which restrained trade could not be enforced); *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959) (recognizing that a contract cannot be enforced if “the judgement of the Court would itself be enforcing the precise conduct made unlawful” by the antitrust laws.); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 261-62 (1909) (holding that a contract for the sale and purchase of wallpaper which was an integral part of a scheme to monopolize the wallpaper industry could not be enforced).

314. See *Kosuga*, 358 U.S. at 518 (“As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court.”) (footnote omitted).

315. *Id.* at 520 (citation omitted).

316. See *id.* at 518.

Sherman Act, but whether the particular promise is such an agreement.³¹⁷

For example, in *Kelly v. Kosuga*, the plaintiff and defendant were both engaged in the business of marketing onions.³¹⁸ Defendant admittedly purchased fifty cars of onions from the plaintiff, but refused to pay. Instead, the defendant argued that the sale was made pursuant to a general agreement between himself, the plaintiff, and other marketers of onions not to deliver plaintiff's onions to the futures market for the remainder of the season.³¹⁹ According to the defendant such an agreement pertained to the prices of onions and limited the quantity of onions sold in Illinois.³²⁰ The Supreme Court rejected the defense noting "the narrow scope in which the defense is allowed in respect to the Sherman Act"³²¹ Interpreting its prior precedents, the Court noted that the defense has been upheld only when "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act."³²² Because the sale of onions could be separated from the agreement not to restrict the supply of onions available on the market, the defense did not apply.³²³

Even recognizing the narrow scope of the illegality rule, efforts to seek judicial approval and enforcement of settlements agreements which themselves embody the prohibited restraint upon trade clearly violate the rule. In that respect, the situation is closer to the facts of *Continental Wall Paper Co. v. Louis Voight & Sons Co.*³²⁴ In that case, the plaintiff sought the enforcement of a contract for the sale and purchase of wallpaper which it admitted "was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme [to restrain trade]."³²⁵ The plaintiff corporation was created by nearly all of the wallpaper manufacturers at the time and sold the wallpaper to "jobbers."³²⁶ The plaintiff and the jobbers entered into an agreement in which the jobbers would purchase all their wallpaper from the plaintiff. The jobbers further agreed that they would not sell the wallpaper at terms better or prices lower than those offered by the plaintiff.³²⁷ Jobbers who were not part of this

317. See, e.g., *id.* at 521 (allowing the enforcement of a contract for the sale of onions at a fair price because the sales agreement was separate from another agreement between the parties not to deliver onions to the futures market); *Continental Wall Paper*, 212 U.S. at 267-68 (Holmes, J., dissenting) (arguing that "[t]he actual contracts by which the plaintiff bound itself to deliver, and the sales under which it did deliver, the specific goods for which it seeks to recover the price," were a separate transaction from the general agreement restraining trade).

318. See *Kosuga*, 358 U.S. at 517.

319. See *id.*

320. See *id.*

321. *Id.* at 520.

322. *Id.* (citation omitted).

323. See *id.* at 521.

324. 212 U.S. 227 (1909).

325. *Id.* at 261.

326. *Id.* at 267-68.

327. See *id.*

combination were driven out of business.³²⁸ According to the Court, the plaintiff sought “a judgment that will give effect . . . to agreements that constituted the combination, and by means of which the combination proposes to accomplish forbidden ends.”³²⁹ This, the Court could not do. “[S]uch a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality”³³⁰

This conclusion is consistent with the principle that public “officials have no independent authority to exempt conduct from the antitrust laws.”³³¹ As the Supreme Court held:

[T]hough employees of the government may have known of those [restraints of trade] and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.³³²

Accordingly, the Supreme Court has consistently held that before state or federal officials can be considered to have granted immunity from antitrust liability to private actors, their authority to do so must be clearly and expressly articulated either as a matter of state law³³³ or federal statute.³³⁴

328. *See id.*

329. *Id.* at 262.

330. *Id.*

331. ALD, *supra* note 6, at 964.

332. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940).

333. *See, e.g., Patrick v. Burget*, 486 U.S. 94, 100 (1988) (“The challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy.’” (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980))). These decisions involved whether private conduct can be considered immunized under the state action doctrine which, as articulated by *Midcal*, not only requires that the anticompetitive policy be clearly articulated by the state, the conduct must be “actively supervised by the state itself.” *Midcal*, 445 U.S. at 105. Interestingly, under this analogous doctrine, the Supreme Court has questioned whether “state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine.” *Patrick*, 486 U.S. at 103.

334. *See, e.g., California v. Federal Power Comm’n*, 369 U.S. 482, 485-86 (1962) (concluding that the Natural Gas Act provided no express exemption from antitrust laws and that the Federal Power Commission was not given the power to enforce the antitrust laws); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 352-53 (1959) (Harlan, J., concurring) (concluding that FCC approval of a contract between NBC and Westinghouse to acquire certain television stations under a “public interest, convenience, and necessity” standard did not bar antitrust review). For a detailed discussion of these two doctrines as applied to the approval of settlements, see Koniak & Cohen,

Consequently, when the settlement agreement itself represents the restraint of trade, courts cannot lend their aid or authority to such agreements. Under those circumstances, even if the conduct can be considered petitioning, it cannot be considered valid petitioning. The parties to the agreement would either be fraudulently concealing the anticompetitive nature of their agreement because they know that the court could not otherwise approve it, or they would be asking the court itself to engage in clearly prohibited conduct by approving an otherwise illegal agreement. Under either circumstance, petitioning immunity would not be justified.³³⁵

CONCLUSION

While the right to petition was once considered the most fundamental right of the English because it was the principal means for criticizing government and seeking political change, its importance under the United States Constitution has been overshadowed by other cognate rights. Freedom of speech and expanded rights of political participation provide additional avenues for seeking the ends once protected by petitioning alone. Despite this diminished prominence, the *Noerr* doctrine demonstrates that the right to petition remains a vital part of our constitutional system of government by affording immunity for efforts to solicit government action. It is unfortunate, therefore, that the boundaries of the right are so poorly defined.

By examining petitioning's history and the development of the *Noerr* doctrine, this Article suggests a methodology for determining whether conduct is protected by the right to petition. Focusing on whether the private conduct is a valid effort to influence government, the means/source analysis both clarifies and simplifies the immunity analysis while remaining true to petitioning's constitutional status and its history. By limiting petitioning immunity to valid persuasive efforts, the means/source analysis also minimizes any potential conflict between the First Amendment and the antitrust laws without overemphasizing the values embodied in the antitrust laws. Lastly, by applying this analysis to the settlement of litigation, we see that while the symmetry of immunizing decisions to either "accept or reject" a settlement is facially appealing, it does not withstand deeper analysis. By affirmatively withdrawing their dispute from governmental deliberation, parties to settlements are responsible for any restraints upon competition that may result from their agreements even if a judge approves the settlement.

supra note 8.

335. See *supra* Part II.A.1.

THE LINK BETWEEN STUDENT ACTIVITY FEES AND CAMPAIGN FINANCE REGULATIONS

LESLIE GIELOW JACOBS*

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INTRODUCTION

Consider two seemingly diverse scenarios recently addressed by the U.S. Supreme Court: Fundamentalist Christian students sue their universities for giving some of their mandatory activity fees to ideologically liberal student organizations;¹ politicians and political action committees across the ideological

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1. See *Southworth v. Grebe*, No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000), rev'g 151 F.3d 717 (7th Cir. 1998); see also Anne-Marie Cusac, *Suing for Jesus: A New Legal Team Wants to Cleanse the Campuses for Christ*, THE PROGRESSIVE, Apr. 1, 1997, at 30 (describing the *Southworth v. Grebe* litigation, noting that all three plaintiffs are fundamentalist Christians and that the litigation is funded by the Alliance Defense Fund, which in its newsletter noted that student fee funding of "groups that advocate radical feminism, abortion, and homosexuality" is objectionable

spectrum challenge restrictions on the way they can collect and spend their money.² The link between these two types of claims has not been obvious, but indeed exists at a fundamental level. The question central to resolving both types of claims is the scope of the government's discretion to redistribute speech resources for the purpose of creating a public forum.³ The Court identified this question in resolving the recent student activity fee challenge,⁴ but not in addressing campaign finance issue.⁵ The linkage between the claims thus remains unnoted.

One aspect of this linkage is the government purpose. In both types of cases the government can claim that its purpose is not only consistent with, but affirmatively serves, free speech clause values. Universities across the country "operate against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."⁶ They thus view it as their "business . . . to provide that atmosphere which is most conducive to speculation, experiment and creation."⁷ The purpose of the student activity fees funding mechanism is to promote diversity of expression on campus by making it possible for a broader range of speakers to participate than could if their speech

because the groups "promote values and take actions contradictory to Christian beliefs").

2. See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897 (2000) (Republican candidate for state auditor and a political action committee that wanted to contribute more to him sued to enjoin enforcement of a campaign contribution limit). Similar cases have involved different plaintiffs. See, e.g., *California Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1286 (E.D. Cal. 1998) (listing plaintiffs as including the California Democratic Party, the California Republican Party and numerous unions, as well as the named political action committee), *aff'd*, 164 F.3d 1189 (9th Cir. 1999). These and other challenges to campaign contribution limits occur against the background of the Court's decision in *Buckley v. Valeo*, 404 U.S. 1 (1976), which interpreted the Constitution to permit some contribution limits but generally not to permit restrictions on expenditures.

3. See *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1040 n.5 (9th Cir. 1999) (deciding in a student activity fees challenge whether "a public university may . . . constitutionally establish and fund a limited public forum for the expression of diverse viewpoints."); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 33 (1998) (arguing that the Supreme Court's decision in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), "implicitly accepts the view that campaign speech is part of a legally structured, institutional realm in which speech can be regulated—in this case, a sphere that can be opened to the views of people but (partially) closed to those of corporations—in order to improve the democratic character of elections").

4. See *Southworth*, 2000 U.S. LEXIS 2196, at *31 (university through fee funding mechanism "may create what is tantamount to a limited public forum").

5. See *Shrink*, 120 S. Ct. at 905-09 (addressing government purpose of preventing corruption and the appearance of corruption).

6. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

7. *Rounds*, 166 F.3d at 1038 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (a statement of a conference of Senior scholars from South Africa))).

opportunities depended solely on the money they could generate in the private economic market.⁸

Similarly, federal and state governments are charged with structuring and running elections that comport with constitutional and democratic ideals.⁹ Full expression from a wide range of speakers about self-government issues is at the core of free speech clause protection.¹⁰ To the extent that campaign finance regulations could seek to “restrict the speech of some elements of our society in order to enhance the relative voice of others”¹¹ their purpose would be to promote a more full exposition of viewpoints on electoral issues than occurs in a speech market that mirrors the distribution of money in the private economy.¹² This Article argues that recognizing the government’s purpose as creating and structuring a public forum means that such an equalizing purpose could comport with the free speech guarantee.

Another aspect of this linkage is the nature of the free speech clause claim. In both the student activity fees and campaign finance challenges the claim was that the Constitution limits the government’s ability to redistribute speech resources even for a purpose that may seem to serve free speech clause values.¹³ In the fee redistribution context, students unsuccessfully argued that such “life-support” for groups that “cannot survive in the marketplace of ideas” violated their free speech rights.¹⁴ In the campaign finance context, the Court has held that regulations aimed at “equalizing the relative ability of individuals and groups to influence the outcome of elections” violate the Constitution because “[t]he

8. See *Rosenberger*, 515 U.S. at 834 (stating that the purpose of student activity fees forum is “to encourage a diversity of views from private speakers”).

9. See *Burson v. Freeman*, 504 U.S. 191, 198-99 (1992) (recognizing State’s compelling interests in “[p]rotecting the right of its citizens to vote freely for the candidates of their choice” and “protect[ing] the right to vote in an election conducted with integrity and reliability”).

10. See *id.* (“Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

11. *Id.* at 48-49. The Supreme Court has interpreted the Constitution to forbid such an equalizing purpose. See *id.* at 49-50. But see *Nixon v. Shrink Mo. Gov’t PAC*, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) (arguing that *Buckley*’s words “cannot be taken literally” because “[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many.”).

12. See Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (arguing for an “equal-dollars-per-voter” rule because “wealthy citizens should not be permitted to have a greater ability to participate in the electoral process simply on account of their greater wealth.”).

13. See *Southworth v. Grebe*, No. 98-1189, 2000 U.S. LEXIS 2196, at *26 (Mar. 22, 2000) (noting “the important and substantial purposes of the University, which seeks to facilitate a wide range of speech”), *rev’g* 151 F.3d 717 (7th Cir. 1998); *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (rejecting “ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections” as a justification for expenditure limits).

14. *Cusac*, *supra* note 1, at 30.

First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."¹⁵ Despite the different results, however, the basic outline of the claimed individual speech right in both instances is the same: that the free speech guarantee grants individuals speech power in the "marketplace of ideas" in proportions that mirror their shares of economic resources in the private financial market.¹⁶ To the extent that this claimed right is indeed contained within the Constitution, it would allow individuals to veto collective action aimed at augmenting speech opportunities by equalizing them.

This link between the issues—the common government purpose and the same claimed individual right to thwart it—sheds new light on both of them. Crucial to understanding both is a definition of the scope of the government's discretion to choose to regulate individuals' money for the purpose of creating and structuring a public forum. This Article provides such a definition.

Part I spells out the boundaries of the controversies that underlie the recent cases, noting that they raise the same fundamental constitutional question of the government's ability to redistribute speech resources to create a public forum. Part II examines the specifics of this linkage. Part II.A notes that in both controversies the claimed individual speech right depends upon equating government regulation of money with such regulation of speech. Part II.B identifies the common government purpose of creating and structuring a public forum. Part II.C examines the different government means of compelling as opposed to restricting spending. This subpart concludes that while the means may make some difference in the constitutional inquiry, they are not the crux of the analysis.

Part III identifies and examines the factors relevant to resolving the appropriate scope of government action in both contexts. Part III.A looks at the government purposes that can justify speech market adjustment. Subparts examine the government purposes to encourage diverse expression, to promote fair deliberation and decision making, and to protect disfavored speakers, concluding that each of these purposes can justify redistributing private speech resources. Part III.B spells out effects that can invalidate speech-conscious governmental action. Subparts discuss the dangers of government favoritism, distorting public perceptions, and silencing speakers in the process of encouraging greater participation in the speech market. While all of these dangers are real and may exist intolerably in any particular case, these subparts note that both student activity fee distribution systems and campaign finance regulations can be structured to minimize these effects and thus enhance the constitutionality of the government action.

Part IV applies the analysis to both issues. Part IV.A discusses student

15. *Buckley*, 424 U.S. at 48-49.

16. *See id.* at 50 (rejecting expenditure limits as inconsistent with the free speech guarantee); Cusac, *supra* note 1, at 30, 32 (quoting the president of the Alliance Defense Fund, which financed the *Southworth* litigation, as stating that groups threatened by a loss of student activity fee funding "ought to get better at the marketing business").

activity fee funding mechanisms, explaining the multiple reasons why the fact that fees are distributed to a wide range of student groups strongly supports the constitutionality of the mechanism. Part IV.B discusses campaign finance regulations. It notes that the government purpose of structuring full and fair debate on electoral issues should be strong enough in theory to support both contribution and spending¹⁷ restrictions. Problems will most likely be in the proof. The government must prove a purpose to enhance free speech clause values, as opposed to thwart them by, for example, covertly favoring the incumbents who usually must participate in enacting the regulations. It also must address the difficult question of what level of restriction serves its diversity and fair deliberation purposes while not squelching expression in the process, although it should have some discretion to choose what this point is.

I. THE CONSTITUTIONAL ISSUES

A. *Mandatory Student Activity Fees*

In addition to tuition, which is mandatory and funds the many aspects of classroom learning, most universities also require students to pay "activity fees."¹⁸ The purpose of such additional assessments is to fund activities outside the classroom that further the universities' educational missions.¹⁹ Although the specifics of the amounts and methods of distribution vary,²⁰ such fees typically provide funds to run student government,²¹ to create and circulate student

17. The Court has upheld contribution limits as justified by other government purposes relating to corruption and the appearance of corruption. *See Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 902 (2000); *Buckley*, 424 U.S. at 27. Thus the primary application of this alternate public forum purpose is to justify expenditure limits which require more compelling justification than contribution limits. *See Nixon*, 120 S. Ct. at 904. Nevertheless, the public forum purpose should serve as an additional justification for contribution restrictions as well. *See id.* at 911 (Breyer & Ginsberg, JJ., concurring) ("[B]y limiting the size of the largest contributors, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.").

18. *See* DAVID L. MEABON ET AL., *STUDENT ACTIVITY FEES: A LEGAL AND NATIONAL PERSPECTIVE* 24 (1979) (90% of universities fund student activities with mandatory fees).

19. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 824 (1995) ("[T]he purpose of the [University of Virginia Student Activities Fund] is to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" (quoting App. to Pet. for Cert. 61a)).

20. *See Southworth v. Grebe*, No. 98-1189, 2000 U.S. LEXIS 2196, at *10-11 (Mar. 22, 2000) (student activity fee for the 1995-1996 academic year was \$331.50; Regents control distribution of one portion, student body controls distribution of the portion to student groups, subject to Regents' approval), *rev'g* 151 F.3d 717 (7th Cir. 1998); *Rosenberger*, 515 U.S. at 824 (student activity fee is \$14 per semester; student council has initial authority to disburse funds, but its actions are reviewable by a faculty body).

21. *See, e.g., Southworth*, 151 F.3d at 717 ("[F]ees fund . . . the Associated Students of Madison budget."); *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500 (Cal. 1993) (noting that

publications,²² and to pay for some or all of the activities conducted by a range of student organizations.²³

The organizations funded are typically composed of students united by a common interest or pursuit.²⁴ These unifying features may include academics,²⁵ recreation,²⁶ religious belief,²⁷ recognition and celebration of culture,²⁸ ethnicity,²⁹ or sexual orientation,³⁰ or discussion and advocacy with respect to particular social issues.³¹ Some of these student groups are affiliated with state, national, or international organizations.³²

The recent case before the Court centered around a university's authority to allocate a portion of mandatory student activity fees to student groups that

proceeds of University of California student fees "support a wide variety of activities in addition to student government").

22. See, e.g., *Rosenberger*, 515 U.S. at 822 (describing the university's authorization of "the payment of outside contractors for the printing costs of a variety of student publications"); *Kania v. Fordham*, 702 F.2d 475, 476 (4th Cir. 1983) (student fees fund *The Daily Tar Heel* at the University of North Carolina).

23. See *Southworth*, 2000 U.S. LEXIS 2196, at *11 (during the 1995-1996 school year fees funded 623 groups); *Rounds v. Oregon State Bd. of Educ.*, 166 F.3d 1032, 1034 (9th Cir. 1999) (fees fund "[o]ver eighty University organizations, including athletic, culturally-oriented, and political group's").

24. See Dave Newbart, *College Student Fees Face First Amendment Test*, CHI. TRIB., June 4, 1997, § 1, at 17 ("[F]ees . . . go to special-interest groups such as chess clubs, black student unions, Asian-American associations and food science clubs.").

25. See *Smith*, 844 P.2d at 504 ("Most of the registered student groups [funded with activity fees] are devoted to academic, cultural, or recreational pursuits. The Physics Students Society [is a] random, typical example[.]").

26. See *Southworth*, 151 F.3d at 719 (nonallocable portion of student fees cover "the first and second year of the Recreational Sports budget"); *Smith*, 844 P.2d at 504.

27. See *Rosenberger*, 515 U.S. at 847 (interpreting Constitution to require university to fund *Wide Awake: A Christian Perspective at the University of Virginia* when the university funded a wide range of other student publications); *Rounds*, 166 F.3d at 1039 (organizations funded include the Muslim Student Association and the Jewish Student Union).

28. See *Smith*, 844 P.2d at 504 ("typical student group" is the Spanish Club); *Rounds*, 166 F.3d at 1034 ("culturally-oriented" student groups receive fee funding).

29. See Newbart, *supra* note 24, at 17 (groups funded include "black student unions [and] Asian-American associations").

30. See *Southworth*, 151 F.3d at 720 (the Lesbian, Gay, Bisexual Campus Center receives fees funding); *Smith*, 844 P.2d at 504 (Gay and Lesbian League receives fees funding).

31. These causes vary widely and can include such causes as environmental preservation, see *Smith*, 844 P.2d at 504 (student affiliates of the Sierra Club), AIDS awareness, see *Southworth*, 151 F.3d at 702 (fees fund the Madison AIDS Support Network), and to promote "sensitivity to and tolerance of Christian viewpoints," *Rosenberger*, 515 U.S. at 826-27 (noting that this is the purpose of *Wide Awake Productions*, a student group entitled to funding by student fees).

32. For example, student organizations such as Amnesty International, Greenpeace, and the National Organization for Women have national affiliates.

engaged in “political or ideological” expression that conflicted with the personal beliefs of the student plaintiffs forced, through the fee mechanism, to fund it.³³ On the one hand, the Court had held that in some instances universities must fund student groups’ ideological speech.³⁴ Specifically, where a university funds a wide range of student publications, the free speech clause of the First Amendment prohibits the school from discriminating against those that express a religious ideology.³⁵ On the other hand, in the context of compulsory union security fees³⁶ and attorney bar dues,³⁷ the Court had interpreted the Constitution to place limits on the government’s use of dissenters’ fees to fund special activities. Specifically, in both of those instances, the Court had held that the Constitution limits the use of mandatory monetary exactions from individuals to expressive activities “germane” to the government’s purpose for creating the organization and compelling the payments to it.³⁸ These decisions, in turn, were extensions of the Court’s holding that the First Amendment “freedom of speech” guarantee includes the right not to speak.³⁹ As the right to “contribut[e] to an

33. *Southworth*, 2000 U.S. LEXIS 2196, at *19 (citing *Southworth*, 151 F.3d at 731, 735).

34. See *Rosenberger*, 515 U.S. at 834 (“University may not discriminate based on the viewpoint of private persons whose speech it facilitates” when it “expends funds to encourage a diversity of views from private speakers.”).

35. See *id.* at 819 (invalidating a prohibition on funding a publication that “‘primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality’” as discriminatory when university funds wide range of other publications (quoting App. to Pet. for Cert. 61a)).

Prior to the recent decision, courts had differed on the extent to which the Constitution prohibited mandatory student fees to be used to fund educational activities that include political or ideological speech. Compare *Rounds v. Oregon State Bd. of Educ.*, 166 F.3d 1032, 1038 (9th Cir. 1999) (use of student activity fees at University of Oregon to fund Oregon Student Public Interest Group Education Fund (OSPIRG EF) is constitutional where funding creates a “diverse . . . limited public forum” and separate education fund “limits university funding to educational activities,” which may include political speech, rather than the “legislative lobbying and more overtly political action” engaged in by the parent, nonstudent OSPIRG), with *Southworth*, 151 F.3d at 732 (“The First Amendment is offended by the Regents’ use of objecting students’ fees to subsidize organizations which engage in political and ideological activities” regardless of whether the funding is germane to the universities’ mission in that it creates a public forum for diverse expression.”).

36. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

37. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

38. *Id.* at 13.

Abood held that a union could not expend a dissenting individual’s dues for ideological activities not ‘germane’ to the purpose for which compelled association was justified: collective bargaining. . . . The State Bar may therefore constitutionally fund activities germane to [its] goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14 (quoting *Abood*, 431 U.S. at 235).

39. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 634 (1943) (rejecting the

organization for the purpose of spreading a political message is protected by the First Amendment,"⁴⁰ so, too, is the right to refrain from making such contributions.⁴¹

Because of the similarity of compelled contributions, courts had applied the analysis drawn from the union and bar dues cases to answer the student activity fees controversy,⁴² reaching conflicting results.⁴³ The conflicts illustrated that the germaneness test is not self-defining.⁴⁴ Rather, it requires a judgment about the closeness of the relationship between an organization's activities and its legitimate mission.⁴⁵ Moreover, because there are degrees of "germaneness,"⁴⁶ this judgment must include an assessment of the free speech clause interests on both sides of the controversy.⁴⁷ The problem with lifting the analysis from the previous mandatory payment cases and applying it to the student fees issue is that the surface similarity between the cases obscures constitutionally significant differences between the types of cases.

proposition that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *Barnette*, 319 U.S. at 637)).

40. *Abood*, 431 U.S. at 235 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

41. *See id.* ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.").

42. *See, e.g., Rounds v. Oregon State Bd. of Educ.*, 166 F.3d 1032, 1036-37 (9th Cir. 1999) ("We do not confront these issues in a vacuum, for the Supreme Court has already constructed the analytical framework for our examination," citing the germaneness test from *Abood* and *Keller*); *Southworth v. Grebe*, 151 F.3d 717, 723 (7th Cir. 1998) (noting the need to apply a "germaneness analysis"), *rev'd*, No. 98-1189, 2000 U.S. LEXIS 2196 (March 22, 2000).

43. *See Southworth*, 2000 U.S. LEXIS 2196, at *20 (noting "conflicting results" in lower courts); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 851 (1995) (O'Connor, J., concurring) (noting "a split in the lower courts" with respect to the application of the *Abood/Keller* analysis to student activity fees).

44. *See Southworth*, 2000 U.S. LEXIS 2196, at *27 (noting that "it is difficult to define germane speech with ease or precision where a union or bar association is the party, [and] the standard becomes all the more unmanageable in the public university setting."); *see also Rounds*, 166 F.3d at 1037 ("These principles are easily described in theory: application is a more operose task."); *Southworth*, 151 F.3d at 723-24 ("*Abood* did not provide much guidance as to its actual application *Keller* still left many lines to be drawn.").

45. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 15 (1990) (noting that the germaneness of activities to an organization's purpose will fall on a "spectrum").

46. *See Southworth*, 151 F.3d at 727 (rejecting a "broad reading of germaneness") (citation omitted).

47. *See Rounds*, 166 F.3d at 1039 (noting that in the context of student activity fees the goals of the university in compelling payments "are inextricably connected with the underlying policies of the First Amendment").

The difference relied upon by the Court in rejecting application of the germaneness standard to the student fee context is the “vast unexplored bounds” of the speech public universities seek to encourage.⁴⁸ A more precise way of stating this difference between the cases that is crucial to the constitutional analysis is that in previous cases, the government created an organization to serve a primarily nonspeech function.⁴⁹ In several ways this primarily nonspeech governmental purpose supported a constitutional interpretation limiting the use of mandatory payments for speech. First, the government did not have positive free speech interests inherent in the collective purpose to hold up against the free speech interests of dissenters.⁵⁰ Second, excising some tangential speech activities to serve the interests of individual dissenters did not significantly undermine the collective purpose.⁵¹ Third, because the government purpose was to fund a single organization dedicated to pursuing a nonspeech objective, the speech incidentally funded would be of one viewpoint chosen by those who had majority control of the government-created organization.⁵² The effect of compulsory funding of such speech would therefore be to redirect private speech resources from minority to majority viewpoints, skewing the marketplace of ideas in a way most inimical to free speech clause values.⁵³ This combination of

48. *Southworth*, 2000 U.S. LEXIS 2196, at *27.

49. *See Keller*, 496 U.S. at 13 (“[T]he compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services.”); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226-27 (1977) (legitimate purpose of union is to engage in “collective bargaining, contract administration, and grievance adjustment”).

50. *Compare Keller*, 496 U.S. at 14 (“[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”), *with Rounds*, 166 F.3d at 1038 (“In assessing purpose, it is of the utmost significance that the organizational speech at issue occurs in an academic setting, for ‘[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.’” (quoting *Sweezy v. State*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN & THE UNIV. OF WITSWATERRAND, *THE OPEN UNIVERSITIES IN SOUTH AFRICA* 10-12 (1957)))).

51. *See Keller*, 496 U.S. at 16 (while “[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative[,] . . . petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.”); *Abood*, 431 U.S. at 236 (noting that the constitutional inquiry involves “drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited”).

52. *See Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (“In *Abood* the plaintiffs alleged that they had no control over the Union’s communications, and that these communications were one-sided presentations of the ‘Union’s viewpoint.’” (quoting *Abood*, 431 U.S. at 275 (Powell, J., concurring))).

53. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech [because] of disapproval of the ideas

factors—(1) a primary nonspeech collective purpose, (2) speech activities tangentially related to it (and therefore dispensable), and (3) a majority viewpoint-discriminatory speech market impact—explain the existence of the individual right to thwart collective speech activities in the context of organizations that serve nonspeech governmental objectives.⁵⁴

Both the governmental purpose and the marketplace of ideas impact of the speech funded differ in the context of student activity fees. Universities frankly acknowledge that their purpose in compelling fees to support organizations that may engage in political or ideological activities is to create a public forum for speech and debate to supplement that which would exist were student speech to depend solely on private funding.⁵⁵ Thus, where creating a public forum is the purpose,⁵⁶ funding speech in the university context is not incidental to some other nonspeech objective. Funding speech *is* the objective. While this purpose would render the government action highly suspect if carried out in a way that exhibited official favoritism of particular points of view,⁵⁷ the universities argued that the neutral funding of a wide range of viewpoints within the created forums enhances, rather than endangers, free speech clause values.⁵⁸ Because of the free speech clause value inherent in the government purpose of creating a forum,⁵⁹ limiting the permissible speech funding would both significantly undermine the

expressed.”).

54. *But see* Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 6-7 (1983) (arguing “*Aboud* and cases akin to it are essentially askew. . . . The constitutional issues genuinely at stake do not preclude the collection of service fees from ideologically offended payors.”).

55. *See Rounds*, 166 F.3d at 1039 (by funding a “broad range of extracurricular activities that are related to the educational purpose of the University,” the University has “created a limited public forum . . . that encourages ‘a diversity of views from private speakers’” (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 824, 830, 834 (1995))); *Kania*, 702 F.2d at 477 (the student newspaper funded by student activity fees serves “the state’s legitimate interest in creating the richest possible educational environment at the University and, in its role as a forum for the expression of differing viewpoints, is a vital instrument of the University’s ‘marketplace of ideas.’”).

56. This Article deals with instances where creating and public speech forum is at least one of the university’s purposes. Where this is not one of the purposes, as where a university funds the organization to provide educational benefits to its students, this analysis may not apply. *See, e.g., Galda v. Rutgers*, 772 F.2d 1060 (1985).

57. *See Rosenberger*, 515 U.S. at 830-31 (when the government creates a limited public forum, it may engage in content discrimination to the extent necessary to preserve the purposes of the forum, but it may not engage in viewpoint discrimination).

58. *See, e.g., Kania*, 702 F.2d at 480 (the student newspaper “increases the overall exchange of information, ideas, and opinions on the campus”).

59. *See Carroll v. Blinken*, 957 F.2d 991, 1001 (2d Cir. 1992) (“A university’s interest in maintaining a thriving campus forum . . . is itself a concern of constitutional dimensions, since the central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate.”).

government purpose⁶⁰ and disserve free speech clause values.⁶¹ Additionally, unlike previous cases, the effect of the compulsory funding is not to skew the marketplace of ideas toward a majority-chosen point of view.⁶² All of these reasons explain the Court's decision to distinguish an individual student's constitutional claim to opt out of financially supporting certain expressive activities within the forum from the claims of public employees or state attorneys that political speech and lobbying by their respective organizations violate the free speech guarantee.

But these are not the only differences between the previous compelled funding cases and the recent challenges to the use of student activity fees. Another crucial difference not noted by the Court in its recent decision complicates the constitutional analysis. In particular, characterizing the university funding schemes as "neutral,"⁶³ while true in the sense that funding does not depend upon the viewpoint of the organizations' intended expression,⁶⁴ hides a crucial aspect of both the purpose and effect of creating the fee forum. Universities claim the right of a collective majority to choose as a common purpose promoting, through the expenditure of collective resources, diverse, including nonmajority, expression.⁶⁵ To fulfill this purpose the universities collect resources from students with majority points of view and redirect them to students with minority viewpoints. So, while the government action does not privilege a majority-favored viewpoint, it nevertheless has a speech market impact.⁶⁶ Specifically, by taking majority resources to fund minority speech the

60. See, e.g., *Cusac*, *supra* note 1, at 31 (without student activity fee funding "much student expression will end"); *Newbart*, *supra* note 24, at 17 (noting that the hardest hit student groups will be the smallest and most controversial).

61. See, e.g., *Rounds v. Oregon State Bd. of Educ.*, 166 F.3d 1032, 1039 (9th Cir. 1999) (noting that the university's goals and "underlying policies of the First Amendment" are "inextricably connected"); *Southworth v. Grebe*, 151 F.3d 1124, 1129 (7th Cir. 1998) (Wood, J., dissenting from denial of rehearing en banc) ("[G]rafting dissenters' rights onto a neutral forum for the expression of a full panoply of viewpoints will most likely eliminate the forum altogether, which is a perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the First Amendment."), *rev'd*, No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000).

62. See *Kania*, 702 F.2d at 480. While "[t]he mandatory fees in *Abood* . . . enhanced the power of one, and only one, ideological group to further its political goals[, the student newspaper] increases the overall exchange of information, ideas, and opinions on the campus." *Id.*

63. *Rosenberger v. Rector & Regents of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (University may "ration or allocate [the] scarce resources on some acceptable neutral principle").

64. See *id.* at 834 ("University may not discriminate based on the viewpoint of private persons whose speech it facilitates.").

65. See *id.* at 834 (University's purpose is to "expend[] funds to encourage a diversity of views from private speakers").

66. See *Southworth*, 151 F.3d at 729 ("[T]he Regents attempt to justify forcing the objecting students to fund these organizations because without funding less speech will result, and less controversial speech.").

government purposefully adjusts the mix of voices in the marketplace of ideas, augmenting the volume of minority speakers to enhance the diversity available for public consumption.

This explicit government purpose to manipulate the marketplace of ideas means that the student activity fees cases posed a fundamentally different constitutional question than the earlier compelled payment cases involving union or bar dues.⁶⁷ In the case of activity fees, dissenting students claimed a constitutional right to thwart a common purpose that the majority government claims serves free speech clause values.⁶⁸ Most basically, their claim was that the free speech clause forbids the government to reallocate speech resources among private parties.⁶⁹ Consequently, at issue in the student activity fees controversy was a collective majority's power to compel its members to support the common purpose of adjusting the relative weights of the voices in the marketplace of ideas to promote more full dialogue and debate.⁷⁰

B. Campaign Finance Regulations

Campaign finance regulations are efforts by government to control the influence of money on politics. While there is no doubt that contributions and expenditures by persons and entities to and on behalf of candidates for office is an important and valuable part of the political process,⁷¹ campaign finance regulations represent governmental determinations that large monetary transfers of either type undermine the integrity of the political process.⁷² The current

67. See Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments: Creating Coherency in Compelled Expression*, 52 RUTGERS L. REV. 123 (1999) (arguing that the Supreme Court's compelled expression cases are best explained as applying strict judicial scrutiny where the government's purpose is to manipulate the marketplace of ideas).

68. *Southworth*, 151 F.3d at 730 ("[The Regents] point to the educational benefits flowing from the very speech to which the plaintiffs so strenuously object.").

69. See *id.* at 731 (holding that these students cannot be required to "fund what they don't believe").

70. See *id.* at 729 n.10 ("The Regents . . . argue that . . . all students benefit from 'robust debate'") (citation omitted).

71. See *Buckley v. Valeo*, 424 U.S. 1 (1976). "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14. "[C]ontribution and expenditure limitations impose direct quantity restrictions on political communication and association." *Id.* at 18.

72. See Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 280 (1991) (noting that Congress has historically passed campaign finance reforms in response to scandals, including the Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (1988)), passed to prevent large corporate contributions like those to presidential candidates William McKinley and Theodore Roosevelt; the Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (codified in scattered sections of 2 and 18 U.S.C.), passed in response to the Teapot Dome Scandal; and the 1974 Amendments to the Federal Election Campaign Act (FECA), Pub. L. No. 93-443, 88 Stat. 1272

constitutional controversy centers around the scope of the government's authority to regulate campaign financing according to its determination of the public interest.⁷³

The blueprint for the scope of the government's authority to regulate campaign financing comes from the Court's review of Congress's effort to regulate federal campaigns after the Watergate scandals.⁷⁴ The Federal Election Campaign Act ("FECA"),⁷⁵ as amended, limited individual contributions to candidates,⁷⁶ limited expenditures both by candidates⁷⁷ and by individuals that related to a particular candidate,⁷⁸ and imposed reporting requirements.⁷⁹ In *Buckley v. Valeo*,⁸⁰ the Court generally upheld the contribution limits⁸¹ and reporting⁸² requirements but invalidated the expenditure limits as in conflict with the free speech and association guarantees.⁸³ The Court found that contribution limits impose "only a marginal restriction upon the contributor's ability to engage in free communication"⁸⁴ and that FECA's primary purpose—"to limit the actuality and appearance of corruption resulting from large individual financial

(codified as amended at 2 U.S.C. § 431-455 (1988)) adopted after the abuses of the 1972 presidential election). Congressional efforts to respond to scandals continue. See Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 780 n.2 (1998) (surveying congressional reform proposals in light of alleged 1996 campaign finance abuses).

73. See *infra* notes 80-90 and accompanying text.

74. See ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 47-49 (1988) (describing that public demands for campaign finance reform compelled legislators to act).

75. Congress first passed the FECA in 1971. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971). The amendments were the subject of Supreme Court review. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455 (1998)).

76. See 18 U.S.C. §§ 608(b)(1), (3) (1994) (individuals may not contribute more than \$25,000 in a single year or more than \$1000 to any single candidate for an election campaign).

77. See *id.* § 608(a), (c) (limiting candidates' use of personal and family resources in their campaign and capping the overall amount candidates can spend campaigning for federal office).

78. See *id.* § 608(e) (individuals may not spend more than \$1000 per year "relative to a clearly identified candidate").

79. See 2 U.S.C. § 431-456 (1994 & Supp. 1999).

80. 424 U.S. 1 (1976).

81. See *id.* at 59. "The contribution ceilings [] serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion." *Id.*

82. See *id.* at 85 ("[W]e find no constitutional infirmities in the recordkeeping, reporting and disclosure provisions of the Act.").

83. See *id.* at 59 ("[The expenditure limits] place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.").

84. *Id.* at 20.

contributions”—was sufficient to justify the Act’s \$1000 per person contribution limit.⁸⁵ By contrast, the Act’s expenditure limits “impose direct and substantial restraints on the quantity of political speech.”⁸⁶ The Court found the governmental interest in preventing corruption or its appearance inadequate to justify the expenditure limits.⁸⁷ The Court held that the governmental interests in preventing corruption and the appearance of corruption are inadequate to justify the ceiling on independent expenditures because (1) donors can easily evade the Act’s limit on expenditures clearly identified with a candidate; and (2) independent advocacy does not pose the same danger of corruption as contributions.⁸⁸ However, the Court also stated that the governmental interest in preventing corruption “does not support the limitation on the candidate’s expenditure of his own personal funds.”⁸⁹ Additionally, the preventing corruption interest is not sufficient to justify overall campaign expenditure caps. The Court also found the alternative government interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections” by “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others” to be “wholly foreign to the First Amendment.”⁹⁰

Despite the *Buckley* Court’s articulation of the constitutional values attached to campaign-related spending and giving, public perception of the damage to the democratic process caused by money in politics has grown since that decision.⁹¹ Public pressure has resulted in governmental efforts, by Congress,⁹² state legislatures,⁹³ and voter initiatives,⁹⁴ to craft reforms that will survive *Buckley*’s guidelines. Inevitably, these reform efforts end up bogged down for years in litigation.⁹⁵

85. *Id.* at 26.

86. *Id.* at 39.

87. *See id.* at 45.

88. *See id.* at 54.

89. *Id.* at 56.

90. *Id.* at 46-47 (independent expenditures); *see id.* at 52, 57-58 (rejecting this interest in the contexts of candidate expenditures and overall campaign spending caps).

91. *See, e.g.,* Paul, *supra* note 72, at 779 (citing news articles and surveys reflecting public attitudes after the 1996 federal elections. “[V]irtually everyone agrees there are problems with the way American elections are conducted.”).

92. *See, e.g.,* Molly Peterson, *Reexamining Compelling State Interests and Radical State Campaign Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L. Q. 421, 426 (1998) (“In the first session of the 105th Congress, at least one hundred pending House and Senate bills proposed changes to existing federal campaign finance laws. . .”).

93. *See, e.g.,* William J. Connolly, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 497-98 (1996) (noting that “[b]y the end of 1993, all but eighteen states had imposed some form of contribution caps applicable to state election campaigns” and that “[m]ost of these limits came about through state legislation.”).

94. *See id.* at 498 (listing examples of state contribution limits that were products of voter initiatives).

95. *See* Kristen Byrnes, *A Survey of Federal Cases Which Involve Campaign Financing*, 7

Because of *Buckley's* seemingly blanket condemnation of expenditure limits,⁹⁶ these reforms have primarily embodied contribution limits.⁹⁷ The focus of courts evaluating them has been *Buckley's* requirement that the government demonstrate a "sufficiently important interest" to justify the limit and that the limit be "closely drawn to avoid unnecessary abridgement of associational freedoms."⁹⁸ Evaluation of the government interest has focused on preventing corruption or its appearance,⁹⁹ which in turn requires defining corruption¹⁰⁰ and evaluating evidence of its existence¹⁰¹ and public perceptions about it.¹⁰² In the tailoring inquiry, courts have looked to the amount of the limit,¹⁰³ often relying on *Buckley's* other requirement that limits not be so low as to prevent candidates

B.U. PUB. INT. L.J. 333 (1998) (noting litigation status of state campaign finance regulations).

96. See Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 358, 373 (1977) (noting absolute language of *Buckley's* expenditure limit condemnation).

97. A wide range of other types of reforms have been proposed. See CENTER FOR RESPONSIVE POLITICS, *MONEY IN POLITICS REFORM: PRINCIPLES, PROBLEMS AND PROPOSALS* 1, 11-17 (1996) (listing possibilities). Some states have experimented with "voluntary" expenditure limits coupled with increased contribution limits for those candidates who agree to the expenditure limits. See, e.g., *California Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1287 (E.D. Cal. 1998) (noting that California's Proposition 208 contains such a provision), *aff'd*, 164 F.3d 1189 (9th Cir. 1999).

98. *Russell v. Burris*, 978 F. Supp. 1211, 1218 (E.D. Ark. 1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). See, e.g., *Arkansas Right to Life State Political Action Comm. v. Butler*, 983 F. Supp. 1209, 1220 (W.D. Ark. 1997) (noting need to determine whether the contribution limit at issue "burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest" (quoting *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1424 (8th Cir. 1995), *rev'd*, 120 S. Ct. 987 (2000))); *California Prolife*, 989 F. Supp. at 1293 (citing *Buckley*, 424 U.S. at 25).

99. See *California Prolife*, 989 F. Supp. at 1293 (finding that deterring corruption in government was a legitimate government interest, but that low contribution limits that would apply to candidates who did not accept voluntary expenditure limits were not closely drawn to serve the interest).

100. See, e.g., Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMM. 127 (1997) (noting difficulties in defining corruption); Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1, 31 (1998) ("References to corruption elicit strong visceral reactions, but corruption is not so easily defined as those reactions might suggest."); Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMM. 97, 103 (1986) (corruption's "apparent clarity is deceptive, and its origin is at best clouded").

101. See, e.g., *California Prolife*, 989 F. Supp. at 1294 (noting that the government must have a substantial reason to suspect corruption to justify campaign finance regulation and that conviction of some members of California legislature for bribery supported the government's interest).

102. See *id.* at 1286-87 (noting that fact that Californians voted for Proposition 208, which was the subject of the litigation, indicated that they suspected corruption).

103. This is not, however, "a constitutional minimum below which legislatures cannot regulate." *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 909 (2000).

from mounting a successful campaign.¹⁰⁴

The upshot of *Buckley* has been to severely cripple governments' efforts to remedy what they perceive to be the damaging influence of money on the political process. That governments cannot enact expenditure limits creates gaping loopholes that critically undermine the effectiveness of contribution limits and other types of campaign finance regulations.¹⁰⁵ Moreover, even these other types of restrictions remain vulnerable to reviewing courts' determinations, pursuant to *Buckley*, that the First Amendment protects individuals from such government regulation.¹⁰⁶

The constitutional dilemma in the context of campaign financing is thus the correctness of *Buckley's* balance between the individual's free speech right and the collective majority's power to regulate the speech market according to its vision of the public good and free speech clause values.¹⁰⁷ The current focus of campaign finance reforms and litigation stems from the Court's early rejection of a valid government interest in equalizing the volume of the voices that participate in political campaigns.¹⁰⁸ Although the means of restriction did not exhibit government favoritism of particular points of view, crucial to the Court was that the government's purpose was nevertheless speech market-related.¹⁰⁹ Specifically, the government's purpose was to adjust the mix of voices in the speech market, restricting the volume of majority speakers to enhance the diversity of ideas available for public consumption.¹¹⁰ By finding such a purpose

104. See *id.* (rather than a specific dollar amount, the test is whether "the constitution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below notice, and render contributions pointless").

105. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 511 (1985) (White, J., dissenting) ("As in *Buckley*, I am convinced that it is pointless to limit the amount that can be contributed to a candidate or spent with his approval without also limiting the amounts that can be spent on his behalf.") (footnote omitted). "[Independent expenditure] controls are imperative if Congress is to enact meaningful limits on direct contributions." *Id.* at n.9 (citing S. REP. NO. 93-689, at 18-19 (1974) *reprinted in* 1974 U.S.C.C.A.N. 5604-5605).

106. See, e.g., *California Prolife*, 989 F. Supp. at 1293 (invalidating contribution limits as not sufficiently related to interest in deterring corruption).

107. See Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 STAN. L. & POL'Y REV. 23, 23 (1998) (arguing that "the United States Constitution should be construed to permit Congress to choose [among visions of campaign finance reform].").

108. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

109. See *id.* at 18.

Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, . . . it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.* (citing *United States v. O'Brien*, 391 U.S. 376, 382 (1968)).

110. In the campaign finance context, the speech market adjustment purpose is closely related to a purpose to adjust "the relative ability of all voters to affect electoral outcomes." *Id.* at 17.

antithetical to the First Amendment, the Court articulated a constitutional vision in which an individual's interest in unlimited campaign spending trumps the collective majority's interest in restricting it to serve a public interest in ensuring full and robust political dialogue and debate.¹¹¹

II. THE CONSTITUTIONAL LINK

The link between the student activity fee and campaign finance issues is that both require defining the scope of the individual free speech right against the scope of the government's discretion to create and structure a forum for expression by a broad range of speakers. Determining the meaning of the free speech clause in any particular context requires assessing the nature and weight of the individual's free speech interests, the interests served by the government action and the free speech impact of the government's means of achieving its objective.¹¹² All of these elements are substantially the same in the contexts of mandatory student activity fees that fund expression and campaign finance regulations.

A. The Individual Free Speech Right: Money = Speech

The crucial premise that defines the individual free speech right in both the student activity fees and campaign finance contexts is that money is speech.¹¹³ So, compelling an individual to fund speech is the same as compelling the

111. See *id.* at 48. "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id.* Additionally, the Court held that "the First Amendment simply cannot tolerate [the Act's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

112. All of the various tests used to determine free speech issues require consideration of these factors. See, e.g., *Turner Broadcasting System, Inc. v. Federal Communications Comm.*, 512 U.S. 622, 662 (1994) ("The intermediate level of scrutiny [requires that a] regulation promote[] a substantial government interest that would be achieved less effectively absent the regulation." (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989))); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (under strict scrutiny, Court looks to where the government action "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end"); *United States v. Albertini*, 472 U.S. 675, 689 (1985); *O'Brien*, 391 U.S. at 377 (regulation of expressive conduct will be upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

113. See *Rosenberger v. Rector & Regents of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (student activity fund is a speech forum "more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable"); *Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

individual to speak¹¹⁴ and restricting an individual's expenditures toward speech¹¹⁵ is the same as restricting the individual's speech directly.¹¹⁶

Of course, money is not really speech.¹¹⁷ And, compelling or restricting the payment of money that is used for speech¹¹⁸ is not exactly the same as compelling or restricting speech directly.¹¹⁹ Rather, the money = speech equation made by the Court in both contexts constitutes a judgment that the government actions regarding money are enough like government actions aimed at speech that they should be subject to the same constitutional scrutiny.¹²⁰

A number of variables can make types of cases "the same" for purposes of free speech clause analysis. Language in the decisions implying that the individual autonomy impact of compelled¹²¹ or restricted¹²² expenditures makes

114. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977) (equating compelled funding of speech with compelled recitation of the pledge of allegiance (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))).

115. In the context of campaign finance regulations, the Court has distinguished expenditure restrictions from contribution restrictions. The former constitute "direct restraints on speech," while the latter "[bear] more heavily on the association or right than on freedom to speak." *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 899 (2000) (citing *Buckley*, 424 U.S. at 19, 24-25).

116. See *Abood*, 431 U.S. at 234 ("[C]ontributing to an organization for the purpose of spreading a political message . . . 'implicate[s] fundamental First Amendment interests.'" (quoting *Buckley*, 424 U.S. at 23)); *Buckley*, 424 U.S. at 16 ("The expenditure of money simply cannot be equated with [] conduct.").

117. See *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) where the Court held that "the expenditures at issue in this case produce speech at the core of the First Amendment." Additionally, as one dissenter noted, "[Expenditures] produce such speech: they are not speech itself." *Id.* at 509 (White, J., dissenting). See also *Shrink*, 120 S. Ct. at 910 (Stevens, J., concurring) ("Money is property; it is not speech.").

118. Not every dollar of every contribution or expenditure is used for speech. See *Buckley*, 424 U.S. at 263 (White, J., concurring in part and dissenting in part) ("There are [] many expensive campaign activities that are not themselves communicative or remotely related to speech.").

119. See *Federal Election Comm'n*, 470 U.S. at 508-09 (White, J., dissenting) ("The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained.").

120. See *Buckley*, 424 U.S. at 15-20 (rejecting treating restrictions on money like restrictions on conduct, and deciding to treat them as "restraints on First Amendment liberty that are both gross and direct"). But see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) ("[N]othing in the First Amendment commits us to the dogma that money is speech.").

121. See *Southworth v. Grebe*, 151 F.3d 717, 730 (7th Cir. 1998) (compulsory student activity fees funding conflicts with students' "deeply held religious and personal beliefs" and the Constitution guarantees "that 'we the people' will not be compelled to pay for such speech: '[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" (quoting *Abood*, 431 U.S. at 234-35 n.31), *rev'd*, No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000)).

122. See *Buckley*, 424 U.S. at 49 (independent expenditure ceiling "heavily burdens . . . the

these actions constitutionally the same as government actions compelling or restricting speech directly is misleading. The individual autonomy impact of governmental control of an individual's money as opposed to her speech is in fact quite different.

The compelled funding cases derive from cases where the government compelled speech directly.¹²³ Where the government compels individuals to speak or otherwise express words not of their own choosing, an autonomy violation can occur either because the forced speech indoctrinates the speaker or because it publicly associates the speaker with the unwanted message.¹²⁴ Neither of these autonomy harms occur with compelled funding.¹²⁵ United States citizens must fund speech all the time through taxes.¹²⁶ These people are not compelled to utter messages out of their own mouths, to become couriers for the government message, or otherwise to be publicly associated with the message.¹²⁷ They are simply required to participate, along with a number of other individuals, in funding speech that a reasonable observer knows does not represent the point of view of every individual who contributed to its propagation.¹²⁸ Although individual taxpayers may violently disagree with the messages of the

First Amendment right to 'speak one's mind . . . on all public institutions'" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964))).

123. See *Abood*, 431 U.S. at 235 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating compelled flag salute and pledge)).

124. See *Jacobs*, *supra* note 67.

125. See *id.*; *Cantor*, *supra* note 54.

A first amendment violation would not seem to arise without government prescription of a message or forced identification with, or affirmation of, a message by the payor.

The genre of spiritual invasion entailed in the payment of service fees for ideologically distasteful ends is quite different from the invasion condemned in *Barnette* or *Wooley*.

Id. at 19.

126. See *Southworth*, 2000 U.S. LEXIS 2196, at *21 ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on parties."); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."); *United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

127. Cf. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470-71 (1997) (using these grounds to distinguish forced contributions for advertising from unconstitutional compelled expression).

128. See *Cantor*, *supra* note 54, at 25 ("[S]uch incursions upon conscience through forced 'support' of distasteful causes is an inevitable concomitant of living in an organized society."). Cf. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 843-44 (1995) (government transfer of money used for religious speech does not violate Establishment Clause where method of distributing money to private groups is "religion-neutral").

government¹²⁹ or private individuals or entities that the government funds with taxes,¹³⁰ this individual impact is not enough to constitute a free speech clause violation.¹³¹

Similarly, restrictions on spending money to produce speech do not impact individuals' autonomy interests as severely as direct speech restrictions. A speaker who cannot spend money can still speak,¹³² although his means and probably the size of his audience are limited.¹³³ But a speaker who cannot speak cannot do it at all. The Court in fact routinely upholds government actions that restrict the money that is available for speech activities¹³⁴ or restrict types of activities on which individuals might want to spend their money to communicate a message.¹³⁵ Taxes both compel people to fund expression with which they disagree and take away financial resources that could be used to communicate the taxpayer's chosen message.¹³⁶ Time, place and manner rules may constitutionally restrict the way that individuals can spend their money to communicate.¹³⁷ People who can employ solicitors to ring doorbells still might

129. Tax protesters must pay taxes despite disagreement with government policies or speech. *See Southworth*, 2000 U.S. LEXIS 2196, at *21.

130. *See National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (government funds disbursed to artists); *Rosenberger*, 515 U.S. at 834 ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

131. *See Rosenberger*, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

132. *See Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 509 (1985) (White, J., dissenting) ("The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained.").

133. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). *But see Wright, supra* note 120, at 1012 ("The giving and spending restrictions may cause candidates and other individuals to rely more on less expensive means of communication. But there is no reason to believe that such a shift in means reduces the number of issues discussed in a campaign.").

134. *See Buckley*, 424 U.S. at 263-64 (White, J., dissenting) (listing numerous ways the government takes money from media or makes their operations more expensive, thus reducing the money available for speech).

135. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding loudspeaker ban); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding requirement that groups use city-provided sound systems and technicians for concerts in the Bandshell in Central Park).

136. *See Cantor, supra* note 54, at 28 ("[Under this] rationale, a first amendment attack on diminution of expressive capacity could be applicable to every government fiscal extraction—i.e., tax, fee, toll, or rent.").

137. *See Ward*, 491 U.S. at 791 ("Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech.").

not be allowed to do so.¹³⁸ Having the money to construct huge neon signboards for a yard display does not mean that it is permitted,¹³⁹ and volume controls limit those with the resources to amplify their messages.¹⁴⁰

All of the above examples confirm that when the Court equates money with speech something other than the impact of the government action on the complaining individual's ability to speak freely is its reason. While speech is always speech, whether money is speech for First Amendment purposes depends upon the context. What is significant about the context is not the degree of impingement on the individual's personal liberty. Rather, what explains the money as speech correlation in both the student fee and campaign finance contexts is the speech market effect of the government action. Specifically, in both instances the government's regulation of money "skews"¹⁴¹ the mix of nongovernment voices in the marketplace of ideas.¹⁴² That the speech market alteration effect is what brings the First Amendment into play is a crucial link between the cases because it signals that the constitutional analysis must focus on the nature of and justification for the marketplace of ideas effect rather than on an abstract assessment of the degree of individual autonomy impingement that occurs when the government regulates money.

B. Government Purpose: To Create and Structure a Speech Forum

The government actions of compelling the payment of student activity fees and restricting campaign-related contributions and expenditures have an effect on the speech market, but, in both contexts, this impact is purposeful rather than incidental.¹⁴³ This government purpose is another crucial link between the cases. Stated most broadly, the government's purpose in both types of cases is to create

138. See *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (invalidating blanket no soliciting rule but stating that a rule that enforced a homeowner's decision not to receive solicitors would be valid).

139. See *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (invalidating city's blanket ban on residential signs but stating that "more temperate measures" could comply with the Constitution).

140. See *Kovacs*, 336 U.S. at 77.

141. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 895 (1995) (Souter, J., dissenting) (there should be no constitutional problem with student activity fee funding because it "do[es] not skew debate by funding one position but not its competitors"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (finding that a regulation that evidences viewpoint discrimination "requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue").

142. See *Buckley v. Valeo*, 424 U.S. 1, 49-50 (1976) (condemning government effort to equalize relative abilities of individuals and groups to participate in political debate).

143. See *Rosenberger*, 515 U.S. at 841 ("The object of the [student activity fund] is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life."); *Buckley*, 424 U.S. at 49 (one "government interest" is to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections").

a speech forum that has a different composition of voices than would exist in the private speech market without government intervention.¹⁴⁴

Purposeful government action that affects the private speech market is highly suspect.¹⁴⁵ Nevertheless, sometimes even purposefully speech-conscious government action can comport with the free speech guarantee. Specifically, where the government creates and structures a public forum, its speech-conscious action may serve rather than thwart free speech clause values.¹⁴⁶ Where creating a public forum is the government purpose, the inquiry in any particular case must be the strength of the government's interest in creating the forum and the safeguards available to prevent the ostensibly speech-enhancing government action from having speech-restrictive results.

As in other instances where the government's purpose is to create and structure a public forum, in both the student fee and campaign finance contexts inherent in the government's purpose is the goal of promoting free speech clause values.¹⁴⁷ While pursuing this purpose involves controversial theoretical¹⁴⁸ and factual¹⁴⁹ determinations, this goal of affirmatively serving constitutional values distinguishes these contexts from instances where the government pursues speech-conscious action for purposes inimical to free speech clause values.

C. *The Means: Compelled vs. Restricted Spending*

One difference between student fee funding mechanisms and campaign

144. See *Buckley*, 424 U.S. at 49 (purpose is to "equalize" expression as compared to private distribution); *Southworth v. Grebe*, No. 98-1189, 2000 U.S. LEXIS 2196, at *26 (Mar. 22, 2000) (university's purpose is "to facilitate a wide range of speech"), *rev'd* 151 F.3d 717 (7th Cir. 1998).

145. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989) ("The government's purpose is the controlling consideration [in determining whether a regulation is content neutral].").

146. See *Rosenberger*, 515 U.S. at 829-30 (assuming that in many instances the government may decide to create a limited public forum and discussing the rules that apply); *Baker*, *supra* note 3, at 16-24 (1998) (discussing numerous instances of "institutionally bound" speech, such as within government decision making bodies).

147. See, e.g., *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1039 (9th Cir. 1999) (university's goals are "inextricably connected with the underlying policies of the First Amendment"); Burt Neuborne, *Buckley's Analytical Flaws*, J.L. & POL'Y 111, 121 (1997) (goal of campaign financing regulation is "to search for a system of structural rules that will enable a more reasoned, a more open, and a more equal discussion leading up to the crucial vote").

148. See *Foley*, *supra* note 107, at 23 (noting that "[t]wo starkly different visions dominate contemporary debates about campaign finance reform" and that "[the] stark difference between the egalitarian and libertarian position on campaign finance derives from a deep-rooted philosophical disagreement about economic justice."). Compare *Southworth*, 151 F.3d at 730 ("educational benefits" of fee forum do not justify compelling students to fund "speech to which [they] strenuously object"), with *Rounds*, 166 F.3d at 1040 n.5 ("To the extent that *Southworth* holds that a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints, we respectfully disagree.").

149. See *Cass*, *supra* note 100, at 1 (questioning premises of campaign finance reform).

finance regulations is the means used by the government to achieve its objectives. With respect to activity fees, students object to being forced to pay for speech, whereas with respect to campaign finance regulations, candidates and their supporters object to not being allowed to do so. In these cases, however, the difference in means does not affect the central constitutional issue.

As noted above,¹⁵⁰ the central constitutional issue is whether the government may create a public forum for the purpose of diversifying the voices that would be available absent government intervention. This involves assessing the constitutional interests on either side of the controversies. One of these is the individual's interest in speaking without government regulation.¹⁵¹ Where the government acts toward speech directly, free speech doctrine generally does not distinguish between the means of compulsion and restriction.¹⁵² Where the government acts toward an individual's money, there is even less reason to do so. Whether the government compels spending toward speech activities or restricts them, the individual can still speak freely.

Despite this fundamental similarity, when money is equated with speech, the government means of compelling as opposed to restricting spending for speech produce somewhat different individual and speech market effects. These effects, however, are balanced so that neither the means of compelling or restricting contributions for speech is clearly the better way to preserve free speech clause values.

On first consideration, the individual impact of compelling fees to fund a public forum may appear less severe than restricting speech expenditures. Although fee compulsions indirectly restrict individual spending on speech by reducing the overall amount of money that the individual has to engage in speech activities, after making the required contributions, individuals remain free to spend any amount of their remaining funds on expression. By contrast, restricting individual spending for speech limits the individual's speech spending for the designated type of speech absolutely.

Another perspective, however, highlights the individual impact of contribution compulsions. Where individuals pay a fee to support a public

150. See *supra* Part III.B.

151. See *supra* Part III.A. (discussing individual autonomy interest and the money/speech correlation).

152. See, e.g., *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."). But see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982))).

forum, they create speech that would not otherwise have existed.¹⁵³ The contributors thereby indirectly bring into being speech with which they may strongly disagree. Where the government restricts expenditures for speech, no one pays to bring potentially offensive speech into being. Opposing viewpoints can speak only according to the weight of the resources that they can garner in the private speech market.¹⁵⁴ In this way, expenditure restrictions might appear to be less intrusive on individual speech interests.

Similarly, the speech market effects of contribution compulsions, as opposed to expenditure restrictions, are mixed so that there is no means to create a speech forum that is always constitutionally preferable. Although fee compulsions do not directly restrict contributions for speech, they indirectly do so by reducing contributors' total resources.¹⁵⁵ So, while fees create speech they may also reduce it.¹⁵⁶ And, while expenditure restrictions undoubtedly reduce the quantity of speech by those subject to the restrictions, they may, in fact, increase speech by others who perceived expression in an unregulated market to be pointless. Moreover, the effect of the government's chosen means on the absolute volume of speech in the marketplace is not the only way to determine whether the government action serves free speech clause values. If the government can show a legitimate interest in regulating the relative weight of voices to promote diversity or fair deliberation, then the crucial inquiry moves from the absolute volume of speech preserved by the means of compulsion as opposed to restriction to their comparative merits in achieving one of these alternate objectives.

For all of these reasons, the means of fee compulsion as opposed to expenditure restriction do not crucially distinguish the student activity fee and campaign finance issues. The central question in both involves the government's discretion to choose to create and structure a public forum. Its means, of course, will be relevant, but must be assessed in light of the other factors in the constitutional analysis, specifically the strength of the government purpose and the effects of the government action in the particular context.

153. See Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2096 (1991) (subsidies "have a productive value: they bring into existence [expression] that would not have existed but for the subsidies.").

154. See Cusac, *supra* note 1, at 30 (quoting Alliance Defense Fund's president as proposing that, instead of distributing student fees to less popular student groups, "the university could teach student groups how to market themselves.").

155. See Cantor, *supra* note 54, at 27 (noting that "a connection between dollars collected from an individual and expressive activity . . . raises the claim that compelled financial extractions deplete the economic resources of the payor and thereby diminish his expressive capacity.").

156. See *id.* at 28 (noting that while the claim of diminished capacity to speak because of fee exactions may be true absolutely, as a constitutional claim it "extend[s] too far" because "a first amendment attack on diminution of expressive capacity could be applicable to every government fiscal extraction—i.e., tax, fee, toll, or rent.").

III. DETERMINING THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF GOVERNMENT ACTION

Determining the constitutionally permissible scope of government action in both the student activity fees and campaign finance cases requires determining the government interests that can justify purposeful speech market adjustment, as well as effects that can defeat the constitutionality of the action.

A. Interests That Can Justify Speech Market Adjustment

1. *Encouraging Diverse Speech.*—In numerous contexts, the government may choose to encourage diverse expression, even though this purpose necessarily changes the mix of voices in the private speech market from what it would have been absent government intervention. One of these contexts is where the government allocates a scarce resource. The government can allocate radio waves¹⁵⁷ and regulate cable television¹⁵⁸ to serve the public interest in receiving a broad range of types of expression. Pursuing this interest, of course, results in a different mix of radio and television speakers than would allocation to the highest bidders.

Another way that the government can encourage diverse expression is by creating and maintaining public forums.¹⁵⁹ The constitutional doctrine that defines public forums emphasizes that the government must act “neutrally” when it structures the conversation within these arenas,¹⁶⁰ perhaps lending the impression that the speech that occurs in public forums merely amplifies the speech that occurs in the private marketplace of ideas. This emphasis on neutrality, however, obscures the speech adjustment inherent in creating or maintaining the forum in the first instance. The existence of public forums generally augments the speech power of minority as opposed to majority voices, and of poor as opposed to wealthy speakers.¹⁶¹ Public forums actually represent

157. See *Red Lion Broad. Co. v. Federal Communications Comm’n*, 395 U.S. 367, 369 (1969) (discussing the Federal Communications Commission’s “fairness doctrine” which requires that “discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.”).

158. See *Turner Broad. Sys., Inc. v. Federal Communications Comm’n*, 520 U.S. 180, 189 (1997) (holding that must-carry regulation imposed on cable operators serves “three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming”).

159. See, e.g., *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45 (1983) (describing three different types of public forum: traditional, limited public, and nonpublic).

160. See *id.* (regulations must be content neutral in a traditional public forum); *Rosenberger*, 515 U.S. at 830-31 (in a limited public forum, regulations must be viewpoint neutral, and must be content neutral except to the extent necessary to maintain the purposes of the forum); *Perry Educ. Ass’n*, 460 U.S. at 45 (regulations in a nonpublic forum must be viewpoint neutral).

161. Neutral rules for allocating the forums will usually diminish private power differences. For example, a rule that allows each student group to meet in a university classroom once a month

a redistribution of resources from majority to minority speakers as government funds pay to create and maintain the arenas.¹⁶²

Creating and maintaining public forums represents one form of government subsidy of speech. The government may also make more direct money payments to encourage diverse private speech. Arts funding by the government brings art into being that would not otherwise exist, thus purposefully and necessarily affecting the content of the marketplace of ideas.¹⁶³ Funding of public television similarly creates private speech and affects the private speech market. And, when universities sponsor speakers series, they act with the purpose of exposing their students to ideas not sufficiently available or prominent in the private market.¹⁶⁴ In all of these instances, the public purpose of creating diversity in the marketplace of ideas justifies using public resources to pursue it.

The government may also sometimes act through the means of restricting speech to achieve its goal of promoting diverse expression. Structuring and maintaining even the most open public forums involves restricting the speech of some private individuals to preserve the forum for a broad range of participants. Parade permits¹⁶⁵ time limits or allocations¹⁶⁶ and volume controls¹⁶⁷ limit the quantity of speech that any individual can deliver, but are also consistent with encouraging wide open discussion and debate. Moreover, if subsidies are viewed as productive, giving funding to one speaker necessarily silences another who wanted to receive the scarce funding.¹⁶⁸

would give the five-person group the same access as the fifty-person group. *See, e.g.,* *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities must be open to all student groups). If forced to pay for the facilities, the groups would likely not have equal access. In some instances, however, "neutral" rules can reinforce or exacerbate existing power differences. A university rule providing classroom access only to groups with membership of fifty or more would have this effect by granting a subsidy only to groups with broad support.

162. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 843-44 (1995) ("The government usually acts by spending money. Even the provision of a meeting room [which constitutes a public forum] involve[s] governmental expenditure, if only in the form of electricity and heating or cooling costs.").

163. *See National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (National Endowment for the Arts uses federal funds to "help create and sustain" art (citing 20 U.S.C. § 951(7)); Fiss, *supra* note 153, at 2096 ("[Subsidies] have a productive value: they bring into existence art, performances, or exhibitions that would not have existed but for the subsidies.")).

164. *See Southworth v. Grebe*, 151 F.3d 717, 721 (7th Cir. 1998) (students do not challenge use of the student activity fees to fund the Distinguished Lecture Series), *rev'd*, No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000).

165. *See Cox v. New Hampshire*, 312 U.S. 569 (1941).

166. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (private groups can erect unattended displays for a certain number of weeks).

167. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (performers required to use city sound equipment in Central Park Bandshell).

168. *See Fiss, supra* note 153, at 2097 ("[S]ilencing is a necessary concomitant of every allocative decision").

In all of these ways, the government can act to diversify the expression available for public consumption even though inherent in the act of diversification is adjustment of the mix of voices in the marketplace of ideas.

2. *Promoting Fair Deliberation and Decisionmaking.*—Another interest that can justify purposefully speech-conscious government action is to promote fair deliberation and decision making. Judicial proceedings, legislative sessions,¹⁶⁹ and administrative hearings operate according to rules that purposefully adjust what would be the private speaking power of the participants.¹⁷⁰ Strict rules define the quantity of speech that any individual speaker can deliver¹⁷¹ and public monies fund the forums, thereby effectively transferring speech resources by government fiat.

Like the speech adjustment to pursue the purpose of diversity, this speech adjustment also has the effect of privileging some speakers over others, particularly those without private power over those who possess it. Moreover, sometimes the government purpose to restrict the speech of more powerful speakers to prevent one message from drowning out all others can be more blatant when the need is more compelling. One circumstance is union elections, where rules limit the employer's voice to ensure that employees can receive and digest alternate messages.¹⁷²

These instances demonstrate that some public interests in full or fair debate can justify purposeful government adjustment of voices in the marketplace of ideas, as well as the use of public resources to do so. They also represent broad acceptance of the government's discretion to choose equalizing the powers of various speakers as the means to ensure fairness in debate, deliberation and decision making.

3. *Protecting Disfavored Speakers.*—The Constitution not only allows the government to act in ways that adjust the relative weights of private voices in the marketplace of ideas, sometimes it requires the government to do so. One such instance is when unpopular speakers create a hostile audience reaction.¹⁷³ Absent

169. See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) (“[I]n Congress . . . constitutionally protected debate[] is limited to provide every member an equal opportunity to express his or her views.”).

170. See *Baker*, *supra* note 3, at 21-24 (“Within institutions of democratic governance, acceptable regulation of speech, including content regulation, is ubiquitous.”).

171. See, e.g., Edward B. Foley, *Public Debate and Campaign Finance*, 30 CONN. L. REV. 817, 819 (1998) (“[T]he Chief Justice does not violate the Constitution when he tells advocates that their time is up during oral argument in the Supreme Court.”).

172. See Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 805 (1998) (listing limitations on employer speech and proposing additional ones).

173. See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (demonstrators arrested because their speech incited onlookers to violence); *Cox v. Louisiana*, 379 U.S. 536 (1965) (speaker arrested because his speech was “inflammatory”); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (speakers arrested because their speech was “sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection”); *Feiner v. New*

government intervention, the hostile audience would likely silence the speaker.¹⁷⁴ Where public disorder is imminent, arresting the speaker to prevent the violence would mirror the result of the private marketplace of ideas. The Constitution, however, forbids this.¹⁷⁵ To fulfill its responsibility of preserving public order, the government must use the threat of force to protect the unpopular speaker.¹⁷⁶

Not only does protecting a speaker from a hostile audience change the mix of voices that would otherwise exist in the marketplace of ideas, it also both redirects resources from majority to minority speakers and restricts the speech of majority speakers to ensure that the minority speech can be heard. When unpopular speech provokes an audience to violence, the least costly option is to arrest the speaker. By foreclosing this option, the Constitution effectively mandates that the government expend majority resources to protect the minority speaker, even though the public resources expended to do so far exceed the speaker's "share" of the speech market.¹⁷⁷ This use of public resources subsidizes minority speech with majority dollars.¹⁷⁸

Police protection of unpopular speakers can also take the form of restricting majority speech that threatens to drown out the minority message.¹⁷⁹ So, police may eject hecklers from speech halls or quiet a crowd that makes it impossible

York, 340 U.S. 315, 317 (1951) ("[Police] stepped in to prevent [speech] from resulting in a fight."); *Terminiello v. Chicago*, 337 U.S. 1, 3 (1949) (speaker arrested and charged with using speech that "stir[red] the public to anger, invit[ed] dispute, [brought] about a condition of unrest, or creat[ed] a disturbance").

174. See, e.g., *Gregory*, 394 U.S. at 111 (noting the ratio between demonstrator and onlooker was 85:1000).

175. See *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."). This rule evolved over time. Compare *Feiner*, 340 U.S. at 320 (speaker can be arrested for "the reaction [his speech] actually engendered"), with *Gregory*, 394 U.S. at 111 (speaker cannot be arrested for disorderly conduct because of listeners' reaction).

176. See *Edwards*, 372 U.S. at 237 ("The Fourteenth Amendment [of the Constitution] does not permit a State to make criminal the peaceful expression of unpopular views.").

177. See *Gregory*, 394 U.S. at 111 (one hundred police officers protect 85 protesters); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992) (holding that a county cannot charge a higher demonstration fee to cover the cost of police protection "in the case of a controversial political message delivered before a hostile audience").

178. See Francis X. Clines, *Neo-Nazis Cancel D.C. March After Only 4 Show Up*, SACRAMENTO BEE, Aug. 8, 1999, at A6 (a force of 1,426 police officers provided a security cordon for a neo-Nazi hate march that did not occur; police chief laments that "the city had just spent close to \$1 million protecting the civil rights of a no-show troublemaker.").

179. See *Gregory*, 394 U.S. at 111 (Constitution does not permit police to arrest about 85 protesters because of hostile reaction of over 1000 onlookers); see also *In re Kay*, 1 Cal. 3d 930, 941 (1970) (en banc) ("[T]he state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion.").

for the speaker to be heard. The silenced speakers may speak at another time, in another place or in another manner. Nevertheless, the government action of restricting what would be their private power to dominate and drown out less powerful speakers alters and equalizes the balance of voices in the marketplace of ideas.

Numerous free speech clause values underpin this requirement that the government act affirmatively to protect unpopular speakers.¹⁸⁰ In any event, its gist refutes a vision of the First Amendment that enshrines private ordering as the speech market distribution that best serves the public value of robust discussion and debate. Embedded in free speech clause doctrine is the different vision of the minority speaker or “lonely pamphleteer”¹⁸¹ as entitled to government protection beyond that which he would be able to acquire either through votes in the democratic process or dollars in the private market. That this vision compels the redistribution of resources and sometimes the suppression of majority speech to protect, and thereby encourage, minority speech suggests that it also leaves room for government discretion to decide to do these things for this purpose.

B. Constitutional Concerns That Can Invalidate Speech-Conscious Government Action

1. *The Danger of Government Favoritism.*—The primary danger against which the free speech clause protects is governmental favoritism of certain viewpoints in the marketplace of ideas.¹⁸² Whether the favoritism takes the form

180. See Edward L. Rubin, *Review Essay: Nazis, Skokie, and the First Amendment as Virtue*, 74 CAL. L. REV. 233 (1986) (discussing free speech clause values that might protect Nazi speech); Lee Bollinger, *The Skokie Legacy: Reflections on an “Easy Case” and Free Speech Theory*, 80 MICH. L. REV. 617 (1982).

One can understand . . . [the] choice to protect the free speech activities of Nazis, but not because people would value their message in the slightest or believe it should be seriously entertained, not because a commitment to self-government or rationality logically demands that such ideas be presented for consideration, . . . not because a line could not be drawn that would exclude this ideology without inevitably encroaching on ideas that one likes—not for any of these reasons nor others related to them that are a part of the traditional baggage of the free speech argumentation; but rather because the danger of intolerance towards ideas is so pervasive an issue in our social lives, the process of mastering a capacity for tolerance so difficult, that it makes sense somewhere in the system to attempt to confront that problem and exercise more self-restraint than may be otherwise required.

Id. at 629-31.

181. See *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“Traditional doctrine [is] that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”).

182. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“In the realm of private speech or expression, government regulation may not favor one speaker over another.”).

of a resource transfer¹⁸³ or a speech restriction,¹⁸⁴ the Court looks at it with great suspicion. This suspicion stems from the fact that government censorship threatens all of the values that underlie the free speech guarantee.¹⁸⁵ Fundamental to these values is ensuring that there exists a wide open and robust marketplace of ideas so that individuals can seek to discover individual truths¹⁸⁶ as well as engage in the reflective self-government on which democracy depends.¹⁸⁷

This fear of government favoritism in the speech market leads to the fundamental analytical division in free speech clause doctrine between content-based and content neutral government actions.¹⁸⁸ The former are subject to strict scrutiny,¹⁸⁹ while the latter are subject to a balancing that weighs the government interest against the burden on free speech interests.¹⁹⁰ Although viewpoint discrimination is the most egregious form of government favoritism,¹⁹¹ subject

183. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that a school district cannot provide meeting-room access to speak about family issues but deny it to those who speak from a religious perspective).

184. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (city cannot criminalize only subset of fighting words that express particular types of animus).

185. See, e.g., Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (listing and discussing values that underpin the free speech guarantee).

186. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Whitney v. California*, 274 U.S. 357, 375 (1927) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . ."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."); JOHN STUART MILL, *ON LIBERTY* (1959) (articulating the "search for truth" rationale for prohibiting government suppression of speech).

187. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) ("When men govern themselves, it is they—and no one else—who must pass judgment upon un wisdom and unfairness and danger. [Just] so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion [which] is relevant to that issue, just so far the result may be ill-considered. [It] is that mutilation of the thinking process of the community against which the First Amendment [is] directed."); see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523 ("[F]ree speech [can serve the value of] checking abuse of power by public officials.").

188. See, e.g., *R.A.V.*, 505 U.S. at 382 ("The First Amendment generally prevents government from proscribing speech [because of] disapproval of the ideas expressed. Content-based regulations are presumptively invalid.").

189. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983).

190. See *United States v. Grace*, 461 U.S. 171, 177 (1983).

191. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

matter discrimination is generally also subject to rigorous review¹⁹² because the government purpose is to skew the marketplace of ideas.¹⁹³

From these concerns stems *Buckley's* rule that, regardless of viewpoint or content sensitivity, government actions are highly suspect when they "involve 'suppressing communication'" to achieve an "equalizing" effect,¹⁹⁴ implying that this purpose, too, creates the danger of government favoritism that is inimical to free speech clause ideals.¹⁹⁵ Along with the great danger of government favoritism, however, is the fundamental purpose of the free speech clause to preserve a diverse marketplace of ideas.¹⁹⁶ Despite the great danger of any government manipulation of the speech market, this fundamental purpose means that the free speech clause leaves room for, and in some instances, mandates, speech-conscious government actions that are consistent with it. The great difficulty is determining where a particular government action falls on the spectrum between dangerous favoritism and salutary speech market enhancement.

In particular, the *Buckley* rule against government equalizing coexists with the assumption that government-created forums and direct monetary subsidies of private speech are consistent with, and in fact promote, the values that underpin the First Amendment, even though both of these actions adjust and equalize the relative weights of voices in the marketplace of ideas. Because the government's purpose is the same in both contexts, the question is whether a concern with government favoritism explains the different abilities of the government to achieve it.

Government forums and speech subsidies are presumptively consistent with free speech clause values when they do not exhibit the type of "government favoritism" inimical to free speech clause values. Access to these opportunities must be either content or viewpoint neutral, meaning that it is distributed according to principles that do not depend upon the expression's message.¹⁹⁷ Specifically, where the government creates a limited public forum, it can engage in content discrimination to preserve the purposes of the forum, but it cannot

192. See *Perry Educ. Ass'n*, 460 U.S. at 46 (content discrimination is permissible in certain circumstances where the government controls the speech or forum).

193. See *Burson v. Freeman*, 504 U.S. 191, 197 (1992) ("[T]he First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.").

194. *Buckley v. Valeo*, 424 U.S. 1, 18 (1976).

195. See *id.* ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

196. See *id.* ("[The First Amendment] was designed to secure the widest possible dissemination of information from diverse and antagonistic sources." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (internal quotations omitted))).

197. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) (articulating rules of access for various types of government forms).

discriminate according to viewpoint.¹⁹⁸ A neutrality that looks to the viewpoint expressed is different from a neutrality that looks to private power, either by number of adherents or by financial resources. Requiring this first type of neutrality thus condones purposeful government speech market adjustment.

First Amendment doctrine embraces the equalizing tendency of content neutral access rules as preferable to the danger of "favoritism" where the government considers the expression's message in allocating speech opportunities.¹⁹⁹ This is true even though, because the government presumptively represents majority sentiment, viewpoint-sensitive allocations would better mirror the private speech market. Equality among viewpoints as a principle of distribution is constitutionally "fair" even though its probable effect is to redistribute private speech power. In fact, its fairness may stem from the recognition that the probable redistribution that occurs when the government creates a public forum is against the majority's interests. The free speech clause was meant to protect against the inevitable urge of the majority in charge of the government to skew the marketplace of ideas in its own favor. Granting new speech opportunities equally to all comers tends to advantage less powerful voices. This effect is the opposite of the "favoritism" that the free speech clause condemns. That the government disadvantages itself is a factor counseling in favor of the constitutionality of a speech-conscious government action.

By contrast to government promoting speaker diversity by creating a public forum, viewpoint-based actions to pursue the same diversity interest carry a greater favoritism danger. For example, the purpose of restricting hate speech or pornography is not only speech conscious but also sets out to disadvantage certain points of view.²⁰⁰ Although the government's argument is that a deficiency in the private market requires government intervention and that such intervention will diversity the range of voices available,²⁰¹ these effects are debatable and come with the certain effect of the government expressly advantaging certain viewpoints.

Consequently, a crucial consideration when the government seeks to augment

198. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)

199. *See Southworth v. Grebe*, No. 98-1189, 2000 U.S. LEXIS 2196, at *33 (Mar. 22, 2000), *rev'g* 151 F.3d 717 (7th Cir. 1998) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as majority views.").

200. *See American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (condemning anti-pornography ordinance because "[u]nder the ordinance graphic sexually explicit speech is 'pornography' or not depending on the perspective the author adopts"), *aff'd*, 475 U.S. 1001 (1986); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 378 (1992) (condemning hate speech ordinance because it "imposes special prohibitions on those speakers who express views on disfavored subjects").

201. *See Note, Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 475 (1984) (noting, with respect to pornography, "the self-expression argument is double-edged. Those who oppose pornography assert that pornography denies women *their* right to individual dignity and choice. They maintain that pornography forces the state to choose whose right to individual dignity and choice it will protect.").

speaker diversity by creating a limited public forum is whether it does so in a viewpoint neutral manner. “Favoritism,” meaning viewpoint-sensitivity in the allocation of speech opportunities, will likely condemn the government action. But, the lack of favoritism when the government acts with the same diversity purpose cuts the other way. That is, public forum doctrine recognizes that free speech clause values are on the government’s side when it chooses to pursue speaker diversity by regulating in a viewpoint neutral way.²⁰²

2. *Distorting Public Perceptions.*—Creating diversity means changing the balance in the marketplace of ideas. A danger of such speech-conscious government action is that it will distort public perceptions of the support that certain ideas have and thereby distort individual truth-seeking and self-government deliberations.²⁰³

The degree of this danger depends on several factors. The first is the degree of accurate correlation between the quantity and volume of speech in the private market and the validity of the ideas in the public’s evaluation. Ability to speak often and loudly in the private market correlates to wealth and political power. Neither of these necessarily accurately reflect the weight or validity of ideas in the public mind. “Distortion” must be measured against an ideal. Private speech ordering is not necessarily it. With respect to the weight of political ideas, one speech dollar per vote might more accurately convey public sentiment.²⁰⁴

Another factor relevant to distorting public perceptions is the degree of public awareness of the government’s involvement in the mix of voices. In a public forum, such as the street corner soap box, or a ritualized forum, such as a criminal trial or legislative debate, no one thinks, or at least no one should think,²⁰⁵ that rules equalizing access accurately reflect the public support for the ideas expressed. To the extent that the public knows the rules of the game, it is aware that it must seek information about the public acceptance of the ideas from some source other than the forum.²⁰⁶ This knowledge greatly reduces the danger

202. See *Southworth*, 2000 U.S. LEXIS 2196, at *28 (imposing only a “requirement of viewpoint neutrality in the allocation of funding support”).

203. See Donald L. Beschle, *Conditional Spending and the First Amendment: Maintaining the Commitment to Rational Liberal Dialogue*, 57 MO. L. REV. 1117, 1150 (1992) (noting danger of distortion of public debate when government selectively subsidizes points of view).

204. See *Foley*, *supra* note 12, at 1213 (arguing that “equal-dollars-per-voter, like one-person-one-vote, is an essential precondition of a democratic legislative process.”).

205. Cf. *Capitol Square Review Bd. v. Pinette*, 515 U.S. 763, 780 (1995) (O’Connor, J., concurring) (endorsement inquiry under the establishment clause should look to the perspective of a “hypothetical observer” who “must be deemed aware of the history and context of the forum.”); see also *id.* at 768 & n.3 (plurality opinion) (discussing that if government in fact operates a public forum even reasonable mistake of observer about endorsement of a religious display should not render access to the forum invalid).

206. See Carolyn Wiggin, *A Funny Thing Happens when You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009, 2027 (1994) (arguing against selective government funding of viewpoints within a public forum, but noting that maintaining the forum does not create this problem because “the public assumes that speech or art

of distortion.

3. *Suppressing the Speech of Some in the Process of Promoting the Speech of Others.*—The effect of suppressing speech while ostensibly promoting it is a constitutional danger, as it can defeat the very purpose that justifies the government action. It is first important to locate where this consideration enters in the context of student fees and campaign finance. As already noted,²⁰⁷ that the government regulates money as opposed to speech directly diminishes the individual autonomy impact. Moreover, where the government acts to enhance speech the First Amendment enters on both sides of the analysis, meaning that the mere fact that the government action diminishes individuals' speech opportunities indirectly is not enough to resolve the constitutional question.²⁰⁸

Once the government demonstrates a legitimate purpose for adjusting the private speech market, the concern with individual impact is appropriately addressed in the means inquiry. That the means to promote the government purpose reduces the quantity of speech in the marketplace of ideas balances against the validity of the government action. The question, then, is whether the government purpose is powerful enough to justify some speech suppression. If so, the additional question is whether any less speech suppressing means exist to achieve the government's objective.

An example is where the government compels one entity to carry the speech of another for the purpose of presenting the public with a diversity of points of view.²⁰⁹ Although the purpose serves First Amendment values, a danger in this context is that the requirement will silence the forced speaker or at least alter the content of the speaker's expression.²¹⁰ The question, then, is whether there exists a less speech suppressing means to achieve the government's objective. Usually there does, because the government could create a public forum funded by all the speech beneficiaries rather than by one alternate speaker.²¹¹

This danger is less pronounced in the context of student activity fees and

within a public forum is representative of views held by members of the public as opposed to officially sanctioned views.”).

207. See *supra* Part II.A.

208. See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) (“[W]here a law significantly implicates competing constitutionally protected interests in complex ways[,] the Court has . . . refrained from employing a simple test that effectively presumes nonconstitutionality.”).

209. See *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (utilities commission order required PG&E to place ratepayer group's newsletter in its billing envelopes); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (statute required newspapers to print replies of candidates attacked in editorials).

210. See *Tornillo*, 418 U.S. at 257 (editors subject to right-of-reply requirement “might well conclude that the safe course is to avoid controversy”); *Pacific Gas & Elec.*, 475 U.S. at 15 (envelope inclusions requirement would have same effect).

211. See *Pacific Gas & Elec.*, 475 U.S. at 15 (contrasting “content-neutral subsidies” with envelope insertion requirement that “forces the speakers opponent—not the tax-paying public—to assist in disseminating the speaker's message”).

campaign financing because the government regulates money rather than speech directly. The regulations do not do anything to the individual's ability to speak on all topics. Nevertheless, both types of regulation limit the individual's ability to spend to speak, which means they are volume limitations. Although not as worrisome as content limitations, volume limitations still pose a First Amendment danger. But, while it is very difficult for the government to justify a content limitation, content neutral volume restrictions are easier to justify. Even when the government does not have First Amendment values on its side, volume restrictions can be consistent with the free speech guarantee.²¹² That the government has such values on its side should add legitimacy to the government action.

If the government's purpose is to create a public forum to promote diverse expression or enhance fair decisionmaking, the question must be whether the purpose justifies suppressing some speech in the process. Where the government compels fees to fund a forum thereby reducing the speech resources of all contributors, the inquiry must be whether the government has a legitimate interest in promoting diverse speech for its constituency, and whether it has spread the burden across the beneficiaries thereby lessening it for all. Where the government restricts expenditures for speech, the same considerations apply. In both instances, the Constitution also requires some inquiry into the absolute amount of the burden. The money payments required or restricted should not be so great as to defeat the purpose that justifies the government action.²¹³ In particular, the government actions ideally should be tailored to preserve the ability of the burdened speakers to speak on all topics while limiting their ability to engage in repetition.

IV. APPLYING THE ANALYSIS TO FEES AND FINANCING

The potential constitutional harm that links the university fee and campaign financing issues is that the government regulates money for the purpose of manipulating the private speech market. Although such a purpose is always highly suspect, sometimes the government can engage in purposeful speech manipulative action. The circumstances of the particular regulation determine whether the government has a sufficient justification to engage in speech-conscious action and whether the regulation is well tailored to minimize the constitutionally dangerous effects of the government action.

A. Fees

Mechanisms for assessing and distributing student fees vary. Most important in assessing a challenge to particular distributions used for expressive activities

212. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

213. See *Shrink*, 120 S. Ct. at 909 (campaign finance limits should not be "so low as to impede the ability of candidates to 'amass the resources necessary for effective advocacy'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976))).

must be the nature of the government's justification. The crucial question must be whether the university is expending fees for the purpose of creating a speech forum.²¹⁴ This purpose distinguishes a fee case from other mandatory payments cases, where speech was incidental to a primarily nonspeech purpose.²¹⁵ Absent the diversity justification, a fees case becomes like these previous payments cases, with the university having very limited leeway to subsidize speech to achieve its nonspeech purpose.²¹⁶

A university expending fees to create a speech forum has powerful justifications on its side. Its purpose to foster intellectual diversity is directly linked to its educational mission.²¹⁷ As such, it is at least as strong as the government's more general purpose to promote speech by subsidizing public forums.

Although fostering simple exposure to a wide range of views is a university's most compelling justification, it can also assert an interest in promoting fairness in the presentation of views to its students during a critical period of self-formation.

The mechanics of particular distribution systems will determine when a university can assert the additional purpose of protecting disfavored speakers. Unless the distribution system is keyed to locking in or augmenting the status quo, the university will be able to assert this interest. This interest, in turn, helps defeat the concern that the effect of the redistribution will be to fund university-favored points of view. Again, the system's mechanics will be important. Established criteria, decisions by a changing body of students, and a record of distributing funds to a wide range of applicants without regard to their majority status will defeat concerns of favoritism.

Most university funding schemes would seem to pose little danger of

214. See *Southworth*, 2000 U.S. LEXIS 2196, at *33 (doubting whether the referendum process for funding student groups appropriately creates a limited public forum because it appears to "substitute[] majority determinations for viewpoint neutrality"); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1040 (9th Cir. 1999) (distinguishing funding of Public Interest Research Group as one of many groups from "a general student activities fee [that] could be perceived as creating a forum to support diverse viewpoints" from previous case in which PIRG received a mandatory fee that "was separate from the general student fee [and so] . . . created a forum that only supported [] PIRG's viewpoints." (citing *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); *Galda v. Bloustein*, 686 F.2d 1059 (3d Cir. 1982))).

215. E.g., *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (state bar dues); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (union dues).

216. See *Keller*, 496 U.S. at 13 (expenditures from mandatory payments for ideological activities must be "germane to the purpose for which the compelled association was justified").

217. See *Southworth*, 2000 U.S. LEXIS 2196, at *26 (university's purpose "to facilitate a wide range of speech" is "important and substantial"); *Rosenberger v. Regents & Visitors of Univ. of Va.*, 515 U.S. 819, 836-37 (1995) (tracing universities' educational missions from "ancient Athens", through the time when "Europe entered into a new period of intellectual awakening" to the present day when "[t]he quality and creative power of student intellectual life . . . remains a vital measure of a school's influence and attainment.").

distortion. The student activity fees funding mechanism is public so all members of the audience presumably know of the redistribution that occurs. Concerned universities could further eliminate the danger of distortion by requiring those groups that receive student fee funding to disclose it in the course of their communications.

Finally, student activity fees funding suppresses the ability of contributors to speak only minimally. Extracting fees does not affect any student's ability to speak on any topic. While it diminishes a student's total assets available for speech, the resource diminution is usually minimal and its effect is no different than tuition, which diminishes student assets by a far greater amount.

B. Campaign Financing

Promoting both diversity and fairness can justify campaign financing regulation, although the weight of the objectives is reversed from the student fees context. Specifically, promoting fair deliberation on campaign-related issues that lead to the decisions that form our representative democracy is as compelling a purpose as promoting such deliberation once the bodies of government are constituted.²¹⁸ Regulations that tend toward equality are consistent with the rules that govern other decision making.²¹⁹ In addition, promoting diversity particularly supports campaign finance regulation because of the self-government rationale that underpins the free speech clause.²²⁰ Regulations that tend toward equality tend to protect disfavored speakers, in the context of campaigns, meaning those critical of the existing government. Thus, all of these justifications support campaign finance regulation.

The specifics of particular regulations will determine whether potentially dangerous effects undermine these purposes. Favoritism is a potent danger. Although equalizing rules may seem to protect government outsiders, there is also the concern that incumbents can achieve name recognition and publicity of

218. See Baker, *supra* note 3, at 2-3.

[L]egislative debates, committee hearings, judicial proceedings, and agency proceedings are contexts where political speech occurs within legally structured or institutionally bound parts of government. In each of these realms, explicitly political and fully protected speech is often subject to severe limits, justified by the goal of making the particular institutional element of government better perform its democratic and governing functions. . . . [C]ampaign speech is an institutionally bound subcategory of political speech. [Campaign finance] [r]egulations are justified as long as they aim at increasing the democratic quality of the institutionalized process of choosing public official or making binding legal decisions.

Id.

219. See Foley, *supra* note 12, at 1213 (equality of campaign speech opportunities stems from equal weight of votes rule).

220. See, e.g., Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 ("The First Amendment protects the freedom of those activities of thought and communication by which we govern.").

their points of view without the expenditures required by challengers who cannot converse with constituents at government expense.²²¹ Another concern is that campaign finance regulation adopted by incumbents will always embody this bias.²²² These are potent concerns and particular regulations must be reviewed with them in mind. That monied interests consistently oppose campaign finance regulations suggests however that concerns of incumbent advantage may be overstated. The crucial point is that the danger of insider advantage should be the focus of the inquiry, not free speech rights more abstractly. Regulations of money do not affect individual autonomy interests to the same extent as direct speech restrictions, and even direct speech restrictions are permissible when supported by the government purpose of promoting full and fair deliberation in a decision making forum.

That the public will be misled by the effects of campaign finance limits seems unlikely. As with fees, it is possible to advertise the specifics of the limits and their equalizing effects. Once the nature of the regime is clear, the public should be no more misled than is a jury that hears the same number of minutes of argument from both the prosecutor and the defense.

Finally, campaign finance regulations indeed carry with them the danger of suppressing speech absolutely in the pursuit of diversifying its content. Although the danger of suppressing speech by restricting what an individual can do with money is more attenuated than a direct speech restriction, it is still a real danger. Nevertheless, even direct speech restrictions comport with the Constitution when the government's interest is strong enough. The crucial question is thus the weight of the government interest as compared to the likelihood and degree of speech suppression. Certainly, the government must prove the need to limit expenditures to achieve fairness and diversity.²²³ In addition, regulations that limit the ability of a speaker to repeat pose less of a constitutional danger than those that limit the ability to express ideas for the first time.

CONCLUSION

The student activity fees and campaign finance regulation challenges raise the same question: the scope of the government's discretion to redistribute money to create and structure a public forum. The government generally can create public forums so long as it does not favor or disfavor particular types of expression. Creating such forums for diverse expression serves the constitutional value of promoting deliberation that includes a wide range of points of view,

221. See Foley, *supra* note 12, at 1243 (addressing concern that campaign finance limits may "act as an incumbency-protection device").

222. See Cass, *supra* note 100, at 57 ("[T]he risk that the law regulating campaign finance disadvantages outsiders and advantages insiders, if not irresistibly strong, is at least more palpable than the harms it is supposed to cure.").

223. See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 900 (2000) ("The question of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

even though this government action redistributes speech resources to achieve this objective. When the government's purpose in compelling student activity fees or regulating campaign spending is similarly to promote the free speech clause value of nurturing rich and full discussion of public issues, these same public forum principles should apply. In both contexts, the government's interest in equalizing speech resources to serve the expressive and deliberative interests of its entire constituency should have weight sufficient to defeat claims by dissenters that such redistribution by the government violates their free speech rights. Whether in any particular case the government's interest in fact prevails over the interests of dissenters must depend upon how well tailored the means are to achieve the theoretically permissible objective.

BENEFICIAL AND UNUSUAL PUNISHMENT: AN ARGUMENT IN SUPPORT OF PRISONER PARTICIPATION IN CLINICAL TRIALS

SHARONA HOFFMAN*

INTRODUCTION

Until the last few decades of the Twentieth Century, prisoners were widely used in biomedical experimentation in the United States.¹ Prisoners served as test subjects for substances ranging from perfume, soap, and cosmetics, to dioxin, psychological warfare agents, and radioactive isotopes.² By 1969, eighty-five percent of new drugs were tested on incarcerated persons in forty-two prisons,³ and prisoners in the United States were even utilized to test drugs for researchers in other countries.⁴ In the following decade investigations revealed that prisoners who were the subjects of clinical research often suffered serious adverse consequences and severe abuses.

Allen Hornblum, who, in his book *Acres of Skin*, wrote a moving expose of medical research that was conducted in one prison, stated in an early chapter:

For two decades—from the early 1950s to the early 1970s—Philadelphia's Holmesburg Prison played host to one of the largest and most varied medical experimentation centers in the country. Only the inmates, and the doctors who experimented on them, know just exactly what took place, but whereas the latter choose not to discuss their earlier medical exploits, the prisoners are not asked. In that respect, Holmesburg is little different from the dozens of other institutions that contained vulnerable populations and [sic] were exploited in the name of scientific advancement. This sad but wide-spread twentieth-century phenomenon has much to teach us about our ethical standards and our capacity for human compassion.⁵

In light of the discovery of severe research abuses, several entities, including the Federal Bureau of Prisons, the American Correctional Association, and the

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1. See 4 ENCYCLOPEDIA OF BIOETHICS 2056 (Warren T. Reich ed., rev. ed. 1995).

2. See NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: RESEARCH INVOLVING PRISONERS, 42 Fed. Reg. 3076, 3076-3091 (1976) [hereinafter REPORT].

3. See Kathleen Schroeder, *A Recommendation to the FDA Concerning Drug Research on Prisoners*, 56 S. CAL. L. REV. 969, 971 (1983).

4. See ENCYCLOPEDIA OF BIOETHICS, *supra* note 1, at 2057.

5. ALLEN M. HORNBLUM, ACRES OF SKIN: HUMAN EXPERIMENTS AT HOLMESBURG PRISON 71 (1998).

U.S. National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, called for a moratorium on prisoner experimentation.⁶ These institutions further advocated the development of standards to regulate medical experimentation in the prison setting and to safeguard the welfare of prisoners who were included in clinical trials.⁷

Subsequently, regulations regarding the use of biomedical experimentation on prisoners were issued by the federal government. Department of Health and Human Services ("DHHS") regulations⁸ limit inmate participation in clinical investigations to the following: (1) studies of the possible causes, effects, and processes of imprisonment and criminal behavior so long as the research involves only minimal risk and inconvenience to the subject; (2) studies of prisons as institutional entities or of inmates as incarcerated individuals, so long as the research involves only minimal risk and inconvenience to the subject; (3) research on particular conditions affecting prisoners as a class so long as the research is approved by the Secretary of Health and Human Services or an authorized DHHS employee ("Secretary"); and (4) research involving a treatment likely to benefit the prisoner himself or herself.⁹ In addition, the institutional review board assessing the clinical trial must include at least one prisoner or prisoner representative¹⁰ and must certify that a variety of conditions have been met and that a number of precautions have been taken.¹¹ As a result of these and other stringent requirements, only about fifteen percent of institutions engaging in clinical research in the United States include prisoners in their research protocols.¹²

Abuse of prisoner subjects in biomedical research or failure to obtain meaningful informed consent from inmates can lead to violations of their constitutional rights. The constitutional provisions that may be implicated in controversies regarding biomedical experimentation on prisoners include the Fourth Amendment, Eighth Amendment, and Fourteenth Amendment. Nevertheless, prohibiting seriously ill prisoners from participating voluntarily in clinical research may constitute an equivalent contravention of their constitutional rights under the Eighth Amendment and the Due Process and Equal

6. See *ENCYCLOPEDIA OF BIOETHICS*, *supra* note 1, at 2056.

7. See *id.*; *REPORT*, *supra* note 2.

8. Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects, 45 C.F.R. § 46.301 (1998).

9. See 45 C.F.R. § 46.306(a)(2). If a prisoner might be assigned to a placebo control arm, the study can proceed only with approval by the Secretary. See *id.* § 46.306(a)(2)(iv).

10. See *id.* § 46.304(b).

11. See *id.* § 46.305(c).

12. Interview with Paula Knudson, Executive Coordinator of the University of Texas Health Science Center Committee for the Protection of Human Subjects (Sept. 18, 1998). See also Reid J. Schar, *Downward Sentencing Departures for HIV-Infected Defendants: An Analysis of Current Law and a Framework for the Future*, 91 NW. U. L. REV. 1147, 1185 n.235 (1997) ("Only 18% of state and federal prisons offer experimental drugs and only 12% allow inmates access to clinical trials of drugs.").

Protection clauses. Because many clinical trials involve potential cures for diseases that frequently affect prison populations, such as hepatitis,¹³ HIV infection, and tuberculosis,¹⁴ regulations that are excessively stringent may deprive prisoners of life-saving therapy.¹⁵ Currently, 1.8 million people are in jail in the United States at any given time.¹⁶ Therefore, policies that bar prisoner participation in biomedical research adversely affect a very large number of Americans.

This Article will analyze the constitutional issues implicated in biomedical research involving prisoners. It will argue that, in light of contemporary regulatory safeguards, the constitutional rights of prisoners enrolled in clinical studies will not be jeopardized. Moreover, the Article will encourage the inclusion of prisoner subjects in biomedical research involving potentially beneficial experimental treatment for life-threatening diseases and will assert that regulations banning the inclusion of prisoners in clinical studies are constitutionally suspect. This Article begins with an overview of clinical trials and informed consent. Next, a brief history of the abuses suffered by prisoners in clinical trials will be presented. The Article will then discuss the Nuremberg Code and the federal regulations applicable to research involving inmates. The constitutional issues relating to prisoners' participation in or exclusion from clinical trials will be analyzed at length. Finally, the author will address the practical and ethical difficulties of conducting biomedical experimentation in which prisoners participate and will provide specific recommendations regarding these impediments.

I. CLINICAL TRIALS AND INFORMED CONSENT

Clinical trials for drugs and devices are regulated by the Food and Drug Administration (FDA).¹⁷ Clinical trials for procedures such as surgeries or bone marrow transplants are not regulated by the FDA but often must comply with DHHS regulations.¹⁸ Drugs studied in clinical trials are called Investigational New Drugs ("INDs").¹⁹ Sponsors wishing to conduct a clinical trial to test a new

13. See 45 C.F.R. § 46.306(a)(2)(iii).

14. See Schar, *supra* note 12, at 1156.

15. See *id.* at 1184-85.

16. See Walter Shapiro, *1.8M Reasons for Criminal-Justice Reform*, USA TODAY, Mar. 17, 1999, at 2A.

17. See 21 C.F.R. § 7.3(f) (1999) ("Product means an article subject to the jurisdiction of the Food and Drug Administration, including any food, drug, and device intended for human or animal use . . .").

18. See 45 C.F.R. § 46.101 (applicable to any research that is conducted, funded, or regulated by any federal department or agency); Richard S. Saver, Note, *Reimbursing New Technologies: Why Are the Courts Judging Experimental Medicine?*, 44 STAN. L. REV. 1095, 1110-11, 1122 (1992).

19. See 21 C.F.R. § 312.23(a).

drug must submit an IND application to the FDA.²⁰ In some circumstances, a drug still under investigation may be used to treat patients not participating in a clinical trial.²¹ Specifically, an IND may be used in treatment of patients if the drug is intended to treat a serious or immediately life-threatening disease,²² and there is no comparable or satisfactory alternative drug or therapy.²³ The drug can be utilized in treatment if it is currently under investigation in a clinical trial, or if clinical trials have been completed and the sponsor is actively pursuing marketing approval with due diligence.²⁴

Medical research for drugs and other treatments is conducted in three or four phases of clinical trials.²⁵ In Phase I, the new drug is given to patients or healthy individuals to determine its toxicity, most effective method of administration, and safe dosage range.²⁶ Participants in the trial receive increasing dosages of the substance in order to determine its metabolism, absorption, and side effects and to gain early evidence of its effectiveness, if possible.²⁷ Phase I clinical trials generally involve only twenty to eighty subjects, last about a year, and have a very high failure rate.²⁸ Seventy percent of drugs submitted for Phase I clinical trials fail to progress to Phase II.²⁹

Phase II trials are designed to determine the effectiveness of the therapy.³⁰ The treatment is administered to patients afflicted with the disease for which the therapy is intended, and the trial often involves 100 to 300 people and lasts about two years.³¹ Approximately thirty-three percent of drugs submitted for clinical trials fail in Phase II testing.³²

Phase III clinical trials are conducted only after the treatment has proven effective through Phase I and II trials.³³ The third phase attempts to assess the medical results of the experimental therapy in comparison with standard therapy or no therapy at all.³⁴ Phase III studies usually involve 1000 to 3000 patients and last about three years.³⁵

20. *See id.*

21. *See id.* § 312.34(a).

22. *See id.* § 312.34(b)(I).

23. *See id.* § 31.234(b)(ii).

24. *See id.* § 312.34(b)(iv).

25. *See id.* § 312.21(a)-(c); *see also* Veronica Henry, *Problems with Pharmaceutical Regulation in the United States*, 14 J. LEGAL MED. 617, 621 (1993).

26. *See* 21 C.F.R. § 312.21(a) (1999); *see also* Henry, *supra* note 25, at 621.

27. *See* 21 C.F.R. § 312.21(a); Henry, *supra* note 25, at 621.

28. *See* 21 C.F.R. § 312.21(a); Henry, *supra* note 25, at 621.

29. *See* Henry, *supra* note 25, at 621.

30. *See* 21 C.F.R. § 312.21(b).

31. *See* Henry, *supra* note 25, at 621.

32. *See id.*

33. *See id.*; *see also* 21 C.F.R. § 312.21.

34. *See* Henry, *supra* note 25, at 621; 21 C.F.R. § 312.21 (1999).

35. *See* Henry, *supra* note 25, at 621.

The FDA may also require postmarketing or Phase IV clinical trials.³⁶ These studies are designed to determine the existence of less common adverse reactions, the effect of the drug on morbidity or mortality, and the effect of the drug on a particular patient population, such as children.³⁷

Research that is conducted, supported, or regulated by any federal department or agency must be reviewed by an Institutional Review Board ("IRB").³⁸ An IRB is a committee designated by an institution to review, approve, and periodically monitor biomedical research studies.³⁹ The IRB receives a document known as the "protocol" regarding each clinical trial, which describes eligibility requirements for participants, the number of subjects to be tested, and the objective of the research.⁴⁰ Each participant must sign an "informed consent" document through which he or she is fully informed of the details of the clinical trial.⁴¹

Both IRBs and the contents of informed consent forms are extensively regulated by the Department of Health and Human Services. Each IRB must have at least five members with varying backgrounds and diversity in terms of race, gender, and culture.⁴² Each IRB must include at least one member whose principal concerns are in the scientific realm and one individual whose primary concerns are nonscientific (e.g. a lawyer or minister).⁴³ Furthermore, each IRB must include at least one member who is not otherwise affiliated with the entity and who has no immediate family member affiliated with the institution.⁴⁴

Unless an expedited review is necessary, research protocols must be reviewed at meetings at which a majority of the members of the IRB are present, including at least one member whose professional expertise is nonscientific.⁴⁵ A majority of the members present must vote for the approval of the research before the medical investigator is permitted to proceed.⁴⁶

An IRB has authority to approve or disapprove the research activities it reviews or to require that they be modified.⁴⁷ The IRB must provide written notification of its decisions to those who proposed the research and must conduct continuing reviews of research it approved at least yearly, or more often if the risks entailed necessitate a more frequent assessment.⁴⁸

In order to approve proposed research, an IRB must ensure that specific

36. See 21 C.F.R. § 312.85.

37. See *id.*; see also Henry, *supra* note 25, at 622.

38. See 45 C.F.R. §§ 46.101(a); 46.103 (1998).

39. See 21 C.F.R. § 56.102(g); 45 C.F.R. § 46.102(g) (1998).

40. See 21 C.F.R. § 56.115; 45 C.F.R. § 46.115.

41. See 21 C.F.R. § 50.20; 45 C.F.R. § 46.116.

42. See 21 C.F.R. § 56.107(a); 45 C.F.R. § 46.107(a).

43. See 21 C.F.R. § 56.107(c); 45 C.F.R. § 46.107(c).

44. See 21 C.F.R. § 56.107(d); 45 C.F.R. §§ 46.107(d).

45. See 21 C.F.R. § 56.108(c); 45 C.F.R. § 46.108(b).

46. See 21 C.F.R. § 56.108(c); 45 C.F.R. § 46.108(b).

47. See 21 C.F.R. § 56.109(a); 45 C.F.R. § 46.109(a).

48. See 21 C.F.R. § 56.109(e), (f); 45 C.F.R. § 46.109(d), (e).

criteria are met. These include: (1) risks to participants are minimized; (2) risks to subjects are reasonable in light of anticipated benefits; and (3) selection of participants is equitable, and the protocol is sensitive to the particularized problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled individuals, or economically or educationally deprived persons.⁴⁹

The information provided to participants on the informed consent document must be written in language that is comprehensible to the subject.⁵⁰ Informed consent may not include language that waives or appears to waive any of the subject's rights or releases the institution or personnel involved in the research from liability for negligence.⁵¹ The regulations further require that informed consent be obtained in writing from each participant, though certain exceptions are allowed.⁵²

The regulations detail the data that must be featured on the informed consent documentation. This information includes a description of the research, an explanation of its risks, benefits, and alternatives, a discussion of confidentiality, a list of contact people, and a statement that participation is voluntary and may be discontinued at any time.⁵³

49. See 21 C.F.R. § 56.111(a); 45 C.F.R. § 46.111(a).

50. See 21 C.F.R. § 50.20; 45 C.F.R. § 46.116.

51. See 21 C.F.R. § 50.20; 45 C.F.R. § 46.116.

52. See 21 C.F.R. § 50.27; 45 C.F.R. § 46.117.

53. See 21 C.F.R. § 50.25(a), (b); 45 C.F.R. § 46.116(a), (b). The provision reads in part as follows:

(a) Basic elements of informed consent. . . in seeking informed consent the following information shall be provided to each subject:

- (1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;
- (2) A description of any reasonably foreseeable risks or discomforts to the subject;
- (3) A description of any benefits to the subject or to others which may reasonably be expected from the research;
- (4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;
- (5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;
- (6) For research involving more than minimal risk, an explanation as to whether

While extensive federal regulations protect contemporary research subjects in the United States, regulatory safeguards are a relatively recent phenomenon.⁵⁴ Absent governmentally-mandated constraints, medical researchers often abused and even tortured those involved in clinical trials, particularly when the participants were prisoners. The history of medical experimentation on prisoners both in this country and abroad is grim and sobering.

any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

- (7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and
- (8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

- (1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;
- (2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;
- (3) Any additional costs to the subject that may result from participation in the research;
- (4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;
- (5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and
- (6) The approximate number of subjects involved in the study.

45 C.F.R. § 46.116(a)-(b) (1998).

54. The relevant federal regulations were promulgated only in the 1970s, as discussed in Part III below.

II. THE ABUSE OF PRISONERS IN CLINICAL TRIALS

Throughout history many different cultures used prisoners for biomedical experimentation. In ancient Persia physicians were permitted to utilize incarcerated individuals as research subjects.⁵⁵ The Roman empire subjected prisoners to the testing of poisons.⁵⁶ Eighteenth century European physicians exposed prisoners to venereal disease, cancers, typhoid, and scarlet fever in order to conduct medical research.⁵⁷

In the United States the earliest known experimentation involving prisoners dates back to 1914, when white male convicts in Mississippi were used in pellagra studies.⁵⁸ Pellagra is a disease that causes dermatitis, diarrhea, dementia, and, at times, death.⁵⁹ The purpose of the experiment was to induce pellagra in twelve volunteers and to study the effects of diet on the disease.⁶⁰ All twelve received pardons and survived, but they were not permitted to leave the clinical trial, even after suffering severe symptoms and begging to be released from it.⁶¹

In California, between 1919 and 1922, hundreds of prisoners took part in a testicular transplant experiment, designed to test whether lost male potency could be reinvigorated.⁶² During World War II great enthusiasm developed for prisoner experimentation, and prisoners signed up for research trials in large numbers in order to show their patriotism.⁶³ In New York scores of inmates volunteered for daily doses of various drugs to assist the Army in determining whether soldiers could carry full workloads under the drugs' influence.⁶⁴ New Jersey supplied the Army with willing participants for research regarding sleeping sickness, sand-fly fever, and dengue fever.⁶⁵ In the Stateville Penitentiary in Illinois, more than 400 prisoners were included in a two-year-long study aimed at finding a cure for malaria, and at the U.S. Penitentiary in Atlanta 600 inmates participated in other malaria research.⁶⁶ As these experiments were developed, researchers began utilizing informed consent forms to provide test subjects with information regarding the trials so that investigators could claim that participants understood the studies in which they enrolled and so that authorities could be absolved from legal repercussions.⁶⁷ A considerable portion of participants in the malaria

55. See *ENCYCLOPEDIA OF BIOETHICS*, *supra* note 1, at 2056.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See* HORNBLUM, *supra* note 5, at 77.

60. *See id.* at 78.

61. *See id.* at 78-79.

62. *See id.* at 79.

63. *See* *ENCYCLOPEDIA OF BIOETHICS*, *supra* note 1, at 2056.

64. *See* HORNBLUM, *supra* note 5, at 81.

65. *See id.*

66. *See id.* at 81, 83.

67. *See id.* at 82.

studies received pardons as a reward for their bravery.⁶⁸

The most notorious large-scale medical experimentation in human history was conducted by the Nazis during World War II. The elite of the German medical community subjected innocent victims in concentration camps to "a broad range of 'ghastly' and 'hideous'" experimentation.⁶⁹ In Buchenwald and Natzweiler, numerous healthy inmates were involuntarily infected with yellow fever, smallpox, typhus, cholera, and diphtheria germs that caused hundreds of them to die.⁷⁰ In other camps Nazi doctors conducted experiments relating to high altitude, malaria, freezing, mustard gas, bone transplantation, sea water, sterilization, and incendiary bombs.⁷¹

The full extent and inhumanity of the medical experimentation conducted by Nazi doctors in concentration camps became public knowledge during the Nuremberg Trials after World War II.⁷² The Nuremberg Trials were opened on November 20, 1945 at the Palace of Justice in Nuremberg, Germany.⁷³ Twenty three Nazi physicians were found guilty of "war crimes and crimes against humanity," and seven of them were sentenced to death.⁷⁴ At the trials the defense argued that the Nazis' research was no worse than "the wartime experiments in the United States such as those carried out at the Joilet, Illinois, prison in which treatments for malaria were sought by physicians who had to first infect the *volunteer* prisoners with the disease."⁷⁵ These arguments failed, however, because the prosecution focused on the fact that in the concentration camps inmates had no choice regarding the torments to which they were subjected, and in the United States prisoners volunteered to participate in clinical trials.⁷⁶

Japanese researchers also conducted barbarous experiments on prisoners in Manchuria during World War II.⁷⁷ The Japanese investigators, however, were never tried, and their crimes remained hidden from public scrutiny for over thirty-five years.⁷⁸ In exchange for silence, the Japanese agreed to share with the American government the data they had gathered regarding biological warfare through experimentation with Chinese captives.⁷⁹

As a result of the Nuremberg Trials, the Nuremberg Code was

68. *See id.*

69. *Id.* at 75.

70. *See id.*

71. *See id.* at 75, 77.

72. *See* Colleen M. McCarthy, Note, *Experimentation on Prisoners: The Inadequacy of Voluntary Consent*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 55, 57 (1989).

73. *See* Bernard D. Meltzer, "War Crimes:" *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VAL. L. REV. 895, 896 (1996).

74. *See* McCarthy, *supra* note 72, at 57 n.10.

75. *Id.* (citing A.M. Capron, *Human Experimentation*, in 1 BIOLAW § 10, at 229 (1986)).

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

promulgated.⁸⁰ The Code is included in the Nuremberg Military Tribunal's decision in the case of *United States v. Karl Brandt*.⁸¹ The Code features ten points that delineate the circumstances under which medical experimentation on human subjects is permissible.⁸² During the latter part

80. *See id.* at 57.

81. *See* 5 *ENCYCLOPEDIA OF BIOETHICS*, *supra* note 1, app. at 2763.

82. Nuremberg Code (1947). The full text of the Nuremberg Code is as follows:

1. The voluntary consent of the human subject is absolutely essential.

This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.
3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.
4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.
5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.
6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

of the Twentieth Century, prisoners have rarely, if ever, been involved in clinical trials outside of the United States.⁸³

In the United States, however, medical research involving prisoners continued for several decades after World War II. In 1953 testing on federal prisoners included research regarding hepatitis, heart disease, intestinal protozoan parasites, athlete's foot, and the common cold.⁸⁴ In the early 1950s nearly 100% of participants in Phase I clinical trials across the United States were prisoners, according to the former chief of clinical investigations for the FDA, Dr. Alan B. Lisook.⁸⁵

The Ohio prison system was involved in some of the most dangerous and controversial experiments of the mid-1950s.⁸⁶ The research was conducted in conjunction with the Sloan Kettering Institute for Cancer Research and Ohio State University's medical research department.⁸⁷ Inmates volunteered to be injected with live cancer cells in both forearms.⁸⁸ Two weeks after the injection, the affected area of one forearm would be surgically removed for study, while the malignant cells remained in the other forearm for an indefinite period of time.⁸⁹

Medical experimentation in the 1950s was not limited to physical ailments. At the Ionia State Hospital in Michigan, at least 142 inmates participated in secret mind-control experiments for the CIA.⁹⁰ The CIA gave numerous "sexual

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7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.
 8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.
 9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.
 10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

Id. at 2763-64.

83. See Schroeder, *supra* note 3, at 970; REPORT, *supra* note 2, at 3077.

84. See HORNBLUM, *supra* note 5, at 89-90.

85. See *id.* at 43.

86. See *id.* at 93.

87. See *id.*

88. See *id.*

89. See *id.*

90. See *id.* at 95.

psychopaths" LSD and marijuana in order to "test the effectiveness of certain medication in causing individuals to release guarded information under interrogation."⁹¹

Biomedical experimentation on prisoners could be extremely lucrative for doctors. Dr. Austin R. Stough, an Oklahoma physician, is estimated to have earned approximately \$1 million a year by selling blood plasma extracted from volunteer prisoners in Oklahoma, Arkansas, and Alabama and by using the prisoners for drug testing.⁹² His customers included Bristol-Myers, Merck, Sharp & Dohme, Upjohn, Lederle, and American Home Products.⁹³

Throughout the 1960s, in fact, drug companies competed for access to prison populations.⁹⁴ In 1964, Upjohn and Parke-Davis contributed over a half million dollars to build a state of the art laboratory inside the State Prison of Southern Michigan at Jackson, which was the largest walled penitentiary in the world and housed 4100 inmates.⁹⁵ Inmates were trained to run the tests in prison labs themselves and were paid between \$.35 and \$1.25 per day, a small fraction of what employees doing such work would earn in a non-prison environment.⁹⁶

Medical experimentation in prisons continued throughout the 1960s and early 1970s.⁹⁷ In 1969 eighty-five percent of all new drugs were tested on prisoners in forty-two prisons.⁹⁸ As late as 1975 at least 3600 prisoners in the United States were used by drug companies as the first humans on whom the safety of new medication was tested.⁹⁹ The federal government, through the Atomic Energy Commission, funded a decade-long radiation study on inmates in Oregon and Washington State prisons.¹⁰⁰ The experiments were designed to determine how much radiation U.S. astronauts could tolerate during space flights.¹⁰¹ Prisoners volunteered for the testing and received small monetary payments, but were required to undergo radiation exposure to their testicles at rates equivalent to approximately twenty diagnostic x-rays.¹⁰² Test subjects suffered painful, lasting effects, and, according to some estimates, almost half of them have since died.¹⁰³ From 1970 to 1975 five agencies of the federal government utilized prison inmates in 125 biomedical experiments and nineteen behavioral research studies.¹⁰⁴

91. *Id.*

92. *See id.* at 97.

93. *See id.*

94. *See id.* at 103.

95. *See id.*

96. *See id.*

97. *See id.* at 108.

98. *See* Schroeder, *supra* note 3, at 971.

99. *See* ENCYCLOPEDIA OF BIOETHICS, *supra* note 1, at 2056-57.

100. *See* HORNBLUM, *supra* note 5, at 107.

101. *See id.*

102. *See id.*

103. *See id.* at 108.

104. *See* ENCYCLOPEDIA OF BIOETHICS, *supra* note 1, at 2056.

In Petersburg, Virginia, Dr. John L. Sever of the National Institutes of Health conducted a rubella project, exposing prisoners to the disease for sixteen weeks at a time.¹⁰⁵ Inmates earned twenty dollars for their participation.¹⁰⁶ In California and Arizona prisoners were involved in weightlessness experiments for the National Aeronautic and Space Administration.¹⁰⁷ Prisoners were required to remain in bed at all times, some for over six months.¹⁰⁸ In addition, some were placed in compression suits and were forced to endure repeated blood and calcium tests and radioactive isotope injections.¹⁰⁹ Subjects were paid fifty dollars per month and an additional fifty dollars for completing the study.¹¹⁰ They also signed informed consent forms, and these, unlike their predecessors, provided inmates with some degree of protection by stating that the consent forms "shall not be construed as a release of NASA from any future liability."¹¹¹

In *Acres of Skin*, Allen M. Hornblum wrote an expose of the twenty-year testing program at Philadelphia's Holmesburg Prison. The program was run by Dr. Albert M. Kligman, a University of Pennsylvania dermatology professor.¹¹²

Hornblum is particularly critical of three biomedical experiments conducted by Kligman at the prison. First, in conjunction with the Army, he tested a mind-altering substance known as EA 3167 on prisoners in an effort to determine whether it should be added to the Army's chemical warfare stock.¹¹³ Inmates suffered confusion and hallucinations for up to three weeks.¹¹⁴ In addition, Kligman tested radioactive isotopes at the prison despite having little education or experience in radioactive medicine.¹¹⁵ Hornblum alleges that Kligman made various misrepresentations to the U.S. Atomic Energy Commission in order to obtain a required license from the federal government.¹¹⁶ The third experiment denounced by Hornblum is one conducted for Dow Chemical Corporation, involving dioxin, a component of Agent Orange.¹¹⁷ According to the book, Kligman subjected several prisoners to 7500 micrograms of the toxic substance, 468 times the dosage he was instructed to administer by Dow Chemicals.¹¹⁸

Hornblum observes in his book that "[t]he Holmesburg experiments took place before the rise of investigative journalism, and the media, the government,

105. See HORNBLUM, *supra* note 5, at 108.

106. See *id.*

107. See *id.*

108. See *id.* at 109.

109. See *id.*

110. See *id.* at 108.

111. *Id.* at 109.

112. See *id.* at xix-xx, 35. Kligman is the inventor of Retin-A, the acne cream and wrinkle remover, which he tested on Holmesburg prisoners. See *id.* at 214.

113. See *id.* at 127-30, 137, 141-43.

114. See *id.* at 129.

115. See *id.* at 149-61.

116. See *id.*

117. See *id.* at 163-83.

118. See *id.* at 169.

and the public in general, neither knew nor cared about the events occurring daily within the walls of the old city jail.”¹¹⁹ That indifference would vanish in the 1970s.

III. THE OUTCRY AGAINST EXPERIMENTATION ON PRISONERS AND ITS CONSEQUENCES

Concern regarding the mistreatment of medical research subjects in the United States developed in the early 1970s, largely as a result of publicity concerning the Tuskegee syphilis study.¹²⁰ The Tuskegee study was conducted from the 1950s until the beginning of the 1970s and was designed to study the effects of untreated syphilis in a group of African American men.¹²¹ The researchers professed to treat the patients, but never divulged to them that they were not being provided with the easily available and fully effective cure¹²² of penicillin.¹²³ The subjects thus continued to suffer from the debilitating illness while believing that they were receiving adequate care.¹²⁴

The Senate held subcommittee hearings in 1973 and subsequently established the National Commission for the Protection of Human Subjects in Biomedical and Behavioral Research through the National Research Act of 1974.¹²⁵ The National Commission operated between 1974 and 1978.¹²⁶ In 1976 the Commission recommended to the Secretary of the Department of Health, Education and Welfare (“HEW”) (now “DHHS”) that the government declare a moratorium on funding and approving prisoner studies until any prison that allowed inmate experimentation met at least minimum criteria to protect inmate subjects.¹²⁷ HEW published regulations for prisoner protection in clinical trials in 1978.¹²⁸ Although DHHS modified the regulations addressing biomedical research when it succeeded HEW, it retained the sections relating to prisoners.¹²⁹ In general, DHHS regulations apply to any research involving human subjects that is conducted, supported, or regulated by any federal department or agency.¹³⁰

DHHS regulations are designed to limit the circumstances in which researchers may include prisoners in their studies and to provide adequate

119. *Id.* at 242.

120. *See* McCarthy, *supra* note 72, at 58.

121. *See* WILLIAM J. CURRAN ET AL., HEALTH CARE LAW AND ETHICS 276 (5th ed. 1998).

122. *See id.*

123. *See* THE BANTAM MEDICAL DICTIONARY 424 (rev. ed. 1990).

124. *See* CURRAN ET AL., *supra* note 121, at 276.

125. *See* Pub. L. 93-348, 88 Stat. 342, § 201; McCarthy, *supra* note 72, at 58-59.

126. *See* BARUCH A. BRODY, ETHICAL ISSUES IN DRUG TESTING, APPROVAL AND PRICING 103 (1995).

127. *See* ENCYCLOPEDIA OF BIOETHICS, *supra* note 1, at 2056; REPORT, *supra* note 2, at 3079-81.

128. *See generally* 45 C.F.R. § 46.301 (1998).

129. *See* McCarthy, *supra* note 72, at 59.

130. *See* 45 C.F.R. § 46.101(a).

protection to inmate subjects. The regulations recognize that prisoners living in a harsh prison setting may be coerced into accepting risks that free citizens would not and that investigators may be tempted to utilize a "captive" group to undergo biomedical studies that would not be tolerated by civilians who are not incarcerated.¹³¹

The regulations impose special requirements and duties upon IRBs assessing clinical trials that involve prisoners. An IRB reviewing such research must include at least one prisoner or prisoner advocate, and a majority of its members may not be otherwise associated with the prison at issue.¹³²

The IRB must ensure that the advantages that the prisoners enjoy through participation in the trial with respect to living conditions, healthcare, food, amenities, and potential earnings are not so great as to render the inmate unable to weigh the risks of the study against its benefits in the prison environment.¹³³

131. See Eileen Kelly, *Expanding Prisoners' Access to AIDS-Related Clinical Trials: An Ethical and Clinical Imperative*, 75 THE PRISON JOURNAL 48, 57 (1995).

132. See 45 C.F.R. § 46.304. The provision reads in relevant part as follows:

In addition to satisfying the requirements in § 46.107 of this part, an Institutional Review Board, carrying out responsibilities under this part with respect to research covered by this subpart, shall also meet the following specific requirements:

- (a) A majority of the Board (exclusive of prisoner members) shall have no association with the prison(s) involved, apart from their membership on the Board.
- (b) At least one member of the Board shall be a prisoner, or a prisoner representative with appropriate background and experience to serve in that capacity, except that where a particular research project is reviewed by more than one Board only one Board need satisfy this requirement.

Id.

133. See *id.* § 46.305(a)(2). The regulation found at 45 C.F.R. § 46.305(a) reads as follows:

- (a) In addition to all other responsibilities prescribed for Institutional Review Boards under this part, the Board shall review research covered by this subpart and approve such research only if it finds that:
 - (1) The research under review represents one of the categories of research permissible under § 46.306(a)(2) [*see infra* note 139];
 - (2) Any possible advantages accruing to the prisoner through his or her participation in the research, when compared to the general living conditions, medical care, quality of food, amenities and opportunity for earnings in the prison, are not of such a magnitude that his or her ability to weigh the risks of the research against the value of such advantages in the limited choice environment of the prison is impaired;
 - (3) The risks involved in the research are commensurate with risks that would

In addition, the risks involved in the trial must be equivalent to those that would be acceptable to non-inmate volunteers,¹³⁴ and the procedures implemented for the selection of participants should be fair and not subject to arbitrary intervention by prison officials or prisoners.¹³⁵ Information provided to prisoners for purposes of informed consent must be articulated in language that is comprehensible to the inmate population.¹³⁶ In addition, Parole boards may not consider prisoner participation in clinical trials when making parole decisions, and prisoners must be informed of this fact.¹³⁷ Finally, adequate follow-up care must be provided, when appropriate, to participants.¹³⁸

The regulations limit inmate participation in clinical investigations to the following: (1) studies of the possible causes, effects, and processes of imprisonment and criminal behavior so long as the research involves only minimal risk and inconvenience to the subject; (2) studies of prisons as institutional entities or of inmates as incarcerated individuals so long as the research involves only minimal risk and inconvenience to the subject; (3) research on particular conditions affecting prisoners as a class so long as the study is approved by the Secretary; and (4) research involving a treatment likely

be accepted by nonprisoner volunteers;

- (4) Procedures for the selection of subjects within the prison are fair to all prisoners and immune from arbitrary intervention by prison authorities or prisoners. Unless the principal investigator provides to the Board justification in writing for following some other procedures, control subjects must be selected randomly from the group of available prisoners who meet the characteristics needed for that particular research project;
- (5) The information is presented in language which is understandable to the subject population;
- (6) Adequate assurance exists that parole boards will not take into account a prisoner's participation in the research in making decisions regarding parole, and each prisoner is clearly informed in advance that participation in the research will have no effect on his or her parole; and
- (7) Where the Board finds there may be a need for follow-up examination or care of participants after the end of their participation, adequate provision has been made for such examination or care, taking into account the varying lengths of individual prisoners' sentences, and for informing participants of this fact.

Id.

134. See *id.* § 46.305(a)(3).

135. See *id.* § 46.305(a)(4).

136. See *id.* § 46.305(a)(5).

137. See *id.* § 46.305(a)(6).

138. See *id.* § 46.305(a)(7).

to benefit the prisoners themselves.¹³⁹ If a prisoner might be assigned to a placebo control arm, the study can proceed only with the Secretary's approval.¹⁴⁰

The FDA, an agency of DHHS,¹⁴¹ published its own proposed regulations in 1980.¹⁴² The regulations were substantially the same as those issued by

139. See *id.* § 46.306(a)(2). The regulation reads in relevant part:

(a) Biomedical or behavioral research conducted or supported by DHHS may involve prisoners as subjects only if:

(1) The institution responsible for the conduct of the research has certified to the Secretary that the Institutional Review Board has approved the research under § 46.305 of this subpart; and

(2) In the judgment of the Secretary [Health and Human Services] the proposed research involves solely the following:

(i) Study of the possible causes, effects, and processes of incarceration, and of criminal behavior, provided that the study presents no more than minimal risk and no more than inconvenience to the subjects;

(ii) Study of prisons as institutional structures or of prisoners as incarcerated persons, provided that the study presents no more than minimal risk and no more than inconvenience to the subjects;

(iii) Research on conditions particularly affecting prisoners as a class (for example, vaccine trials and other research on hepatitis which is much more prevalent in prisons than elsewhere; and research on social and psychological problems such as alcoholism, drug addiction and sexual assaults) provided that the study may proceed only after the Secretary has consulted with appropriate experts including experts in penology medicine and ethics, and published notice, in the Federal Register, of his intent to approve such research; or

(iv) Research on practices, both innovative and accepted, which have the intent and reasonable probability of improving the health or well-being of the subject. In cases in which those studies require the assignment of prisoners in a manner consistent with protocols approved by the IRB to control groups which may not benefit from the research, the study may proceed only after the Secretary has consulted with appropriate experts, including experts in penology medicine and ethics, and published notice, in the Federal Register, of his intent to approve such research.

Id.

140. See *id.* § 46.306(a)(2)(iv).

141. See Kelly, *supra* note 131, at 57.

142. See Schroeder, *supra* note 3, at 984-85.

DHHS.¹⁴³ Nevertheless, on July 29, 1980 inmates in the Michigan State Penitentiary at Jackson filed a lawsuit challenging the proposed FDA regulations.¹⁴⁴ On November 12, 1980, the Upjohn Company, the primary sponsor of drug research at Jackson, intervened as a plaintiff in the case.¹⁴⁵ The plaintiffs alleged that the FDA's proposed ban on prisoner participation in nontherapeutic drug experimentation violated the Equal Protection and Due Process clauses of the Fifth Amendment.¹⁴⁶ With the lawsuit pending, the FDA stayed the effective date of its regulations.¹⁴⁷ The FDA has never removed its stay or repropose its regulations.¹⁴⁸

Existing federal regulations provide significant protection for prisoners participating in clinical trials.¹⁴⁹ Prisoner participation must be informed and voluntary and cannot pose more than minimal risk to the research subject. Despite the many safeguards implemented by DHHS, few inmates have access to clinical trials.¹⁵⁰ According to a survey conducted by the American Correctional Health Services Association, biomedical research involving inmates is prohibited in twenty-two states.¹⁵¹ Relatively few research institutions have accepted prisoners in clinical trials in recent years. These include facilities in Colorado, Connecticut, Maryland, New York, Texas, and Virginia.¹⁵²

In light of history, a concern may exist that individuals cannot, under any circumstances, be adequately protected in a prison setting and that any biomedical experimentation will lead to a violation of the prisoners' legal and moral rights. While it is wise for researchers to be mindful of the sensitive

143. See Kelly, *supra* note 131, at 59.

144. See *Fante v. Department of Health and Human Services*, Civil Action No. 80-72778, (E.D. Mich. filed July 29, 1980), *cited in* 46 Fed. Reg. 35085 (1981).

145. See *id.*; Schroeder, *supra* note 3, at 986.

146. See *Fante*, 46 Fed. Reg. at 35085; Schroeder, *supra* note 3, at 986.

147. See Kelly, *supra* note 131, at 56.

148. See *id.*

149. A recent statement issued by the Office of the Inspector General of the U.S. Department of Health and Human Services is highly critical of the institutional review board system. According to the report, the regulations are inadequately implemented and human subjects are insufficiently protected by IRBs. However, the report did not focus specifically on review of protocols involving prisoners, a process that is subject to higher standards. See OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVICES, INSTITUTIONAL REVIEW BOARDS: A TIME FOR REFORM (1998); see also discussion *infra* Part V.B. Nevertheless, while the regulations themselves provide ample protection for prisoners, some IRBs may be inconsistent in applying the guidelines. The IRB system may therefore need to undergo scrutiny and improvement in order to ascertain that, in practice, prisoners consistently enjoy the benefits of the regulatory safeguards.

150. See Schar, *supra* note 12, at 1185 n.235.

151. See Kelly, *supra* note 131, at 58 (citing Kathryn Duke, *Achieving Balance: Biomedical Research and Inmates*, CORHEALTH, Fall 1993, at 1, 2).

152. See *id.* at 59. GARY L. STEIN & LINDA D. HEADLEY, NORTH JERSEY COMMUNITY RESEARCH INITIATIVE, PRISONERS WITH HIV: GUIDELINES FOR IMPLEMENTING CLINICAL TRIALS IN CORRECTIONAL SETTINGS 7 (July 1995).

circumstances of prisoners, it is also unwise to exclude inmates from all clinical trials. Denying seriously ill prisoners access to experimental treatments may constitute an equivalent violation of prisoner rights and is similarly problematic in moral and legal terms. The next section will focus on the potential constitutional issues implicated in biomedical experimentation involving prisoners.

IV. ANALYSIS OF THE CONSTITUTIONAL RIGHTS OF PRISONERS AS THEY RELATE TO BIOMEDICAL EXPERIMENTATION

A. While Irresponsible Clinical Research May Violate Prisoners' Eighth Amendment Rights, Denial of Potentially Life-Saving Experimental Treatment to Prisoners Also Constitutes Unconstitutional Cruel and Unusual Punishment

1. *Eighth Amendment Overview.*—The Eighth Amendment to the Constitution of the United States prohibits the infliction of “cruel and unusual punishment.”¹⁵³ The Supreme Court originally construed the Eighth Amendment as only precluding punishments of torture and unnecessary cruelty¹⁵⁴ or sentences that are grossly disproportionate to the crime committed.¹⁵⁵ The Supreme Court subsequently broadened its interpretation of the Eighth Amendment and determined that it applies to the treatment inmates receive while incarcerated,¹⁵⁶ including improper medical treatment.¹⁵⁷ The Amendment is understood to embody “broad and idealistic concepts of dignity, civilized standards, humanity, and decency”¹⁵⁸

Nevertheless, it is not easy for prisoners to prevail in Eighth Amendment cases. An inmate alleging an Eighth Amendment violation must establish a grave deprivation of rights to which prison officials have reacted with deliberate indifference.¹⁵⁹ In determining whether a punishment violates the Eighth

153. U.S. CONST. amend. VIII. The text provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” *Id.*

154. See *Wilkerson v. Utah*, 99 U.S. 130 (1878) (holding that death by firing squad is not cruel and unusual punishment).

155. See *Weems v. United States*, 217 U.S. 349, 382 (1910). In *Weems* the Court held that the Eighth Amendment’s cruel and unusual punishment clause was “progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Id.* at 378. See also Samantha A. Moppett, Case Comment, *Constitutional Law—Extending Eighth Amendment Protections to Prisoners Involuntarily Exposed to Unreasonable Levels of Environmental Tobacco Smoke—Helling v. McKinney*, 28 SUFFOLK U. L. REV. 200, 202 (1994).

156. See *Helling v. McKinney*, 509 U.S. 25, 31 (1993); Moppett, *supra* note 155, at 202.

157. See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

158. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (summarizing the Supreme Court’s cases and concluding that the limits of the Eighth Amendment are “not easily or exactly defined”).

159. See *Gamble*, 429 U.S. at 106 (“In order to state a cognizable claim, a prisoner must

Amendment, the Supreme Court has assessed the challenged punitive measure in light of the "evolving standards of decency that mark the progress of a maturing society."¹⁶⁰ Furthermore, the Court has found that deliberate indifference "entails something more than mere negligence . . . [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."¹⁶¹ In order to establish a deliberate indifference claim based on improper medical treatment, an inmate must show that prison officials (1) were aware of the individual's serious medical need; and (2) disregarded, ignored, or refused to provide the inmate with treatment for that need.¹⁶²

If an Eighth Amendment violation arises not from the acts of particular prison officials but from a prison policy, a different test, first articulated by the Supreme Court in 1987 in *Turner v. Safley*,¹⁶³ will be applied. In *Safley*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."¹⁶⁴ In assessing the reasonableness of a regulation, the court must consider the following four factors:

- (1) 'there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it;'
- (2) the court should determine whether there are alternative means of exercising the constitutional right that remain open to the inmates;
- (3) the court is to consider the impact that accommodation of the asserted constitutional right will have on guards, other inmates, and on the allocation of prison resources; and
- (4) the court should assess whether there are ready alternatives to the prison regulation—the absence of such ready alternatives suggests that the regulation is reasonable while their existence may be evidence of the opposite.¹⁶⁵

2. *Bailey v. Lally*.—The case of *Bailey v. Lally*¹⁶⁶ provides a uniquely thorough analysis of an Eighth Amendment challenge to the inclusion of prison inmates in clinical trials. In *Bailey*, state prisoners brought a class action under 42 U.S.C. § 1983 alleging that prisoners who participated in clinical investigations at the Maryland House of Correction's medical research unit had

allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.").

160. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

161. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

162. *See id.* at 837.

163. 482 U.S. 78 (1987). In *Safley* inmates challenged two regulations promulgated by the Missouri Division of Corrections. The Court upheld the regulation concerning inmate-to-inmate correspondence but found the inmate marriage regulation to be invalid.

164. *Id.* at 89. *See also* *Lewis v. Casey*, 518 U.S. 343, 361 (1996).

165. *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990) (quoting *Safley*, 482 U.S. at 90-91).

166. 481 F. Supp. 203 (D. Md. 1979).

suffered violations of their constitutional rights to due process, privacy, and protection against cruel and unusual punishment.¹⁶⁷ After careful consideration and lengthy discussion, the court ruled against the plaintiffs.

A recitation of the facts is important to understanding the court's analysis and thus, will be provided in some detail. The Maryland House of Correction ("MHC") was opened in 1879 and was designed to house approximately 1100 inmates.¹⁶⁸ During the early 1970s the inmate population ranged from 1498 to 1617, and many cells designed for only one person housed two occupants at a time.¹⁶⁹ Until 1976, hot water was unavailable to prisoners.¹⁷⁰ During the winter, inmates suffered from the cold because the prison's heating system was sorely inadequate, and in the summer months, the facility was very hot.¹⁷¹ A large percentage of prisoners had no work, educational, or vocational activities and spent between sixteen and seventeen hours per day in their cells.¹⁷² Those with jobs earned between \$.63 and \$1.46 per day, with the vast majority earning under \$1.10 a day.¹⁷³

A medical research unit was established at the MHC by doctors from the University of Maryland School of Medicine, and research involving prisoners commenced in 1958.¹⁷⁴ Prisoners participating in clinical trials were paid two dollars per day, including Saturdays and Sundays, and additional payments were made if the prisoner underwent particular medical procedures.¹⁷⁵ Approximately one third of the participants lived full-time in a designated section of the medical research unit that, unlike the rest of the prison, had hot water, color television, and three separate bathroom facilities.¹⁷⁶ The patients could retain their jobs and enjoy the income earned from the medical research as a supplement to other earnings.¹⁷⁷ Participation in clinical trials, however, had no impact on parole decisions.¹⁷⁸ This fact was disclosed to some, but not all of the inmates.¹⁷⁹

Prisoners learned of the medical research unit via word of mouth or from an application that some were given when they entered MHC and that was also published in the prison newspaper.¹⁸⁰ Inmates wishing to be included in the medical experimentation were required to complete the application, which

167. *See id.*

168. *See id.* at 205.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.* at 205-06. Prisoners working in the laundry earned \$2.22 per day. *See id.*

174. *See id.* at 206.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.* at 209-10.

180. *See id.* at 207.

included detailed information regarding the research.¹⁸¹ When a study was to be commenced, all applicants would be gathered as a group and addressed by a nurse or a doctor, who explained the reason for and nature of the experimentation as well as its possible risks. Inmates who again expressed interest in participation underwent a physical examination and were given repetitive oral explanations in layman's terms, with opportunities for questions and answers.¹⁸²

Those who were ultimately accepted as participants in the studies were given additional verbal data about the research and were told that they could withdraw at any time.¹⁸³ Many in fact did withdraw both before and during various stages of experimentation.¹⁸⁴ Prisoners were also asked to sign a written consent form.¹⁸⁵

The medical research unit at MHC conducted nontherapeutic studies of various infectious diseases including malaria, cholera, shigella, viral diarrhea, influenza, typhoid, e. coli, and rhinovirus.¹⁸⁶ Nontherapeutic studies are those that do not provide any direct medical benefit to the patient but seek to produce general knowledge about a particular disorder or condition.¹⁸⁷ All of the diseases investigated, with the exceptions of the common cold and the flu, had known cures.¹⁸⁸ Approximately fourteen percent of the prisoners incarcerated at MHC from 1971 to 1975 participated in the medical studies.¹⁸⁹

The plaintiffs alleged in their lawsuit that the poor prison conditions, their idleness, and the salary, which far exceeded earnings from other prison jobs, rendered their participation in the clinical trials coerced and consequently resulted in violations of their Eighth Amendment and other constitutional rights.¹⁹⁰ The Eighth Amendment claim revolved around the question of whether individuals incarcerated in a prison setting can give truly meaningful consent and rationally choose to volunteer for the trial with a full understanding of both its benefits and its risks.¹⁹¹

The *Bailey* court found that the prisoners were adequately informed in light of the numerous verbal explanations and the written consent forms they received.¹⁹² The plaintiffs' strongest allegations were thus rooted in the issue of voluntariness. The plaintiffs argued that the overcrowded and extremely uncomfortable conditions of regular institutional life at MHC caused them to over-value the potential earnings and hours away from their cells and deprived

181. *See id.*

182. *See id.* at 208.

183. *See id.* at 210.

184. *See id.*

185. *See id.*

186. *See id.* at 212 n.15.

187. *See* 45 C.F.R. § 46.406 (1998).

188. *See Bailey*, 481 F. Supp. at 212.

189. *See id.* at 220.

190. *See id.*

191. *See id.* at 219-20.

192. *See id.*

them of the ability to make a meaningful decision.¹⁹³

The court rejected the plaintiffs' claims. It noted that in fact a very small minority of prisoners (only fourteen percent) found the medical research programs appealing and that there was a constant shortage of volunteers.¹⁹⁴ In addition, the court noted the following:

Prisoners at the MHC were not subject to physical abuse, or confined in segregated cells, or restricted to meagre [sic] diets, until they consented to participate in MRU studies. Prisoners were not pressured to participate. To the contrary, prisoners had a viable choice and, even after choosing to participate, had the option to withdraw from the medical studies.¹⁹⁵

The court decision also emphasized that the experiments did not create a danger to the subjects' lives or future health and that the risks of temporary discomfort were fully disclosed to the inmates.¹⁹⁶ Finally, the court focused upon the fact that participation in the clinical studies did not facilitate the inmates' release from MHC, and thus, early parole was not an incentive for enrollment.¹⁹⁷ The court found that the plaintiffs' Eighth Amendment claim failed because the defendant's conduct was not "incompatible with evolving standards of decency"¹⁹⁸ and did not subject them to undue coercion.¹⁹⁹

The medical research in the *Bailey* case was conducted before the DHHS issued its regulations for prisoner research in 1978.²⁰⁰ Today prisoners involved in clinical trials would enjoy far greater protection than that available to the plaintiffs in the *Bailey* case.²⁰¹ Moreover, the experimentation conducted in *Bailey*, which was found not to violate any constitutional rights, would be prohibited by DHHS regulations because it was nontherapeutic, did not benefit the subjects, and did not fall into any of the categories of permissible research.²⁰² In light of contemporary regulatory safeguards and the restrictions placed on investigators conducting research involving prisoners, it is extremely unlikely that prisoner participants would suffer a violation of Eighth Amendment rights in the context of a clinical trial that complies with federal guidelines.

3. *Seriously Ill Prisoners May Greatly Benefit from Experimental Therapies.*—In many instances, experimental treatments provided through clinical trials constitute last chance therapies for desperately ill patients who

193. See *id.* at 220.

194. See *id.*

195. *Id.*

196. See *id.* at 221.

197. See *id.*

198. *Id.* at 219.

199. See *id.* at 221.

200. See McCarthy, *supra* note 72, at 59.

201. See discussion *supra* Part III.

202. See 45 C.F.R. § 46.306(a)(2) (1998).

cannot be cured by conventional medicine.²⁰³ In the prison setting, where a significant percentage of inmates are HIV positive, experimental treatments could benefit many individuals and save many lives.²⁰⁴ Experimental treatments may also be sought by inmates suffering from cancer,²⁰⁵ hepatitis,²⁰⁶ tuberculosis,²⁰⁷ and other diseases.

HIV is one of the predominant health problems in U.S. prisons.²⁰⁸ While HIV had an incidence rate of eighteen cases per 100,000 in the general population in 1992, the rate among prisoners was estimated to be 362 per 100,000 that same year.²⁰⁹ Accounting for up to two-thirds of all inmate deaths in some states, AIDS is the leading killer in correctional facilities.²¹⁰ A 1992-93 survey conducted by the National Institutes of Justice ("NIJ") and the federal Centers for Disease Control and Prevention ("CDC") revealed a total of more than 11,500 AIDS cases and almost 3500 AIDS-related deaths among prisoners in state, federal, county, and large city correctional facilities.²¹¹ The New Jersey Department of Health estimates that almost nine percent of adult male inmates and more than fourteen percent of adult female inmates are infected with HIV.²¹² The Department further estimates that among prisoners with a history of illegal drug use, forty percent of the men and 42.6% of the women are HIV positive.²¹³

Inmates who are HIV positive are highly susceptible to tuberculosis.²¹⁴ From 1976 to 1978, tuberculosis had an incidence rate of 15.4 per 100,000 among New York state prisoners.²¹⁵ By 1992 there was a 1300% increase to a rate of 189 per 100,000.²¹⁶

Despite significant advances in the treatment of AIDS, contemporary treatment modalities offer only limited relief to patients.²¹⁷ Participation in clinical trials can provide inmates with access to promising experimental drugs.²¹⁸ At times, experimental protocols may constitute the only meaningful

203. See Angela R. Holder, *Funding Innovative Medical Treatment*, 57 ALB. L. REV. 795, 795 (1994).

204. See Kelly, *supra* note 131, at 48.

205. See Holder, *supra* note 203, at 795-96.

206. See 45 C.F.R. § 46.306(a)(2)(iii).

207. See Schar, *supra* note 12, at 1156.

208. See James W. Marquart et al., *Health Condition and Prisoners: A Review of Research and Emerging Areas of Inquiry*, 77 THE PRISON JOURNAL 185 (1997).

209. See *id.*

210. See Kelly, *supra* note 131, at 49.

211. See STEIN & HEADLEY, *supra* note 152, at 4.

212. See *id.*

213. See *id.*

214. See Curtis Prout, *Clinical Challenges in the Climate of Prison*, 107 TRANSACTIONS OF THE AM. CLIMATOLOGICAL AND CLINICAL ASS'N 287, 290 (1995).

215. See *id.*

216. See *id.*

217. See STEIN & HEADLEY, *supra* note 152, at 4.

218. See *id.* at 9. Since prisoners are precluded from participating in placebo-controlled

opportunity for a prisoner to receive treatment.²¹⁹ Biomedical research may also provide inmates with the moral satisfaction of contributing to the advancement of AIDS research²²⁰ and with the opportunity “to give something back to society, to redeem, atone, and reconcile.”²²¹ Several commentators have urged the inclusion of prisoners in clinical trials relating to HIV and AIDS²²² and in other studies that might benefit prisoners.²²³

Regulations prohibiting seriously ill prisoners from participation in clinical trials in all cases, including those in which their exclusion results in the denial of potentially life-saving therapy, are vulnerable to constitutional attack. Although no court has rendered a decision regarding this issue, a viable constitutional argument can be made that prisoners with life-threatening illnesses that cannot be otherwise treated have a right to participate in biomedical research that complies with federal regulations.²²⁴

4. *The Eighth Amendment Right to Medical Treatment.*—The Supreme Court has determined that the government is obligated to provide medical care for prisoners because incarcerated individuals cannot independently obtain healthcare.²²⁵ The Court has further stated that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”²²⁶ A prisoner may bring a cause of action for an Eighth Amendment violation under 42 U.S.C. § 1983 if

studies unless the research is approved by the Secretary, prisoners will rarely be deprived of active therapy as research subjects. Generally, those assigned to the control arm of the study will be given standard therapy from which they are likely to benefit.

219. See Dale L. Moore, *An IRB Member's Perspective on Access to Innovative Therapy*, 57 ALB. L. REV. 559, 571-72 (1994) (“[A] significant component of the treatment available to AIDS patients is provided through clinical research trials of new drugs or drug combinations.”).

220. See STEIN & HEADLEY, *supra* note 152, at 9.

221. Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 481 (1996).

222. See, e.g., STEIN & HEADLEY, *supra* note 152, at 9; Kelly, *supra* note 131, at 55; Moore, *supra* note 219, at 571-72.

223. See, e.g., Prout, *supra* note 214, at 291. Prout argues that “[t]here is a crying need for genetic studies” because significant evidence indicates that many prisoners have fathers and grandfathers who were also incarcerated. *Id.* Prout admits, however, that this proposal is controversial because of “fears of breaches of confidentiality, manipulation of the data, and possible political implications having to do with race and ethnicity.” *Id.* at 291-92.

224. Several commentators have argued that the Eighth Amendment requires that sexual offenders who request castration as therapy for their paraphiliac disabilities be provided with the surgical treatment once proper medical evaluation and informed consent have been obtained. Their thesis features several parallels to the arguments made in this Article. See William Winslade et al., *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?*, 51 SMU L. REV. 349 (1998).

225. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

226. *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)).

authorities show deliberate indifference to his or her serious illness or injury.²²⁷

In *Helling v. McKinney*²²⁸ a prisoner alleged that prison authorities had subjected him to cruel and unusual punishment by assigning him to a cell with an inmate who smoked five packs of cigarettes a day, and thus the officials had jeopardized his health.²²⁹ The complaint further asserted that cigarettes were sold to inmates in the prison and that nonsmoking inmates were not informed of the health hazards associated with breathing smoke produced by their cellmates.²³⁰

The Supreme Court held that the Eighth Amendment's protection against deliberate indifference to a prisoner's health problems extends not only to current serious health problems, but also to conditions that threaten to cause health problems in the future.²³¹ Consequently, the prisoner stated a cause of action under the Eighth Amendment when he alleged that prison officials had, with deliberate indifference, exposed him to levels of environmental tobacco smoke that created an unreasonable risk of serious damage to his health in the future.²³² In order to obtain injunctive relief, however, the plaintiff would be required on remand to prove both an objective and a subjective element.²³³ First, he would have to prove that society considers the risk of which he complains "to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."²³⁴ Second, the inmate would be required to establish the subjective factor that prison officials had shown deliberate indifference to the hazards posed to his health.²³⁵ To do so, the plaintiff would need to focus upon the officials' current attitudes and conduct.²³⁶

If exposure to environmental tobacco smoke can constitute an Eighth Amendment violation, it stands to reason that the denial of experimental therapy to an incarcerated person who is seriously ill could also rise to the level of a constitutional violation. If a clinical trial is available for a prisoner who suffers from AIDS or another serious illness and prison officials deny the inmate access to the trial, the inmate might be able to establish a valid cause of action. The prisoner would have to show that failure to allow him access to the available clinical study is so grave that it violates contemporary standards of decency.²³⁷ If the illness at issue is a terminal one, such as cancer or AIDS, for which conventional treatments have failed, this element may not be difficult to establish. In addition, the prisoner will have to prove that the prison officials had shown deliberate indifference to his medical condition by preventing him from

227. See *id.* at 105.

228. 509 U.S. 25 (1993).

229. See *id.* at 28.

230. See *id.*

231. See *id.* at 33.

232. See *id.* at 35.

233. See *id.* at 36.

234. *Id.*

235. See *id.*

236. See *id.*

237. See *id.*

participating in the biomedical research.²³⁸ Success in establishing this element will depend upon the prison officials' reasoning and motivations.²³⁹ However, under *Helling*, the prisoner will not be required to prove that exclusion from the clinical trial posed an immediate risk of physical deterioration, but rather, only that his or her future health may be jeopardized.²⁴⁰ This principle is important for prisoners who are HIV positive since HIV patients may be asymptomatic or minimally symptomatic for many years. However, their future prognosis will depend upon the therapy that they receive throughout the course of the disease, and therapy for HIV patients often includes experimental drug combinations.²⁴¹

If a state implements a regulation that prohibits prisoner participation in clinical trials, as many states have done, the *Safley* test would be used to evaluate any constitutional claim asserted by a prisoner.²⁴² If the prisoner could establish that the regulation denying access to research studies impinges upon inmates' Eighth Amendment rights as discussed above, the prisoner would have to address the following issues: (1) whether a valid, rational connection exists between the prison regulation and the legitimate governmental interest that purportedly justifies it; (2) whether alternative means of exercising the constitutional right remain open to the prisoners; (3) the impact that accommodating the constitutional right will have on guards, other inmates, and prison resources; and (4) whether there are ready alternatives to the prison regulation.²⁴³

Prisoners denied access to potentially life-saving experimental treatments because of a prison regulation should be able to establish all four elements. Under the *Safley* test, it is not enough for state officials merely to articulate a reason for their decision. Rather, the officials' reasoning is subjected to judicial scrutiny.²⁴⁴ The *Safley* test has served as a basis for invalidating prison policies in several cases. The case of *Muhammad v. Pitcher*,²⁴⁵ for example, involved a prison policy of treating inmate mail from the State Attorney General's Office as ordinary mail rather than legal mail and opening it while the addressee was not present.²⁴⁶ The court found that opening the mail in the absence of the prisoners burdened the inmates' First Amendment rights and was not reasonably related to legitimate penological interests.²⁴⁷ Contrary to the defendant's contentions, the court found that a requirement that mail from the Attorney General's Office be opened only in the presence of the addressee would not waste prison resources.²⁴⁸ Moreover, treatment of mail from the Attorney General as ordinary mail left no

238. See *id.*

239. See *id.*

240. See *id.* at 33.

241. See Moore, *supra* note 219, at 571-72.

242. See *Turner v. Safley*, 482 U.S. 78, 89 (1987).

243. See *id.* at 89-90.

244. See *id.*

245. 35 F.3d 1081 (6th Cir. 1994).

246. See *id.*

247. See *id.* at 1085.

248. See *id.*

alternative for prisoners who wished to communicate confidentially with the Attorney General in order to redress grievances.²⁴⁹ Similarly, in *Castillo v. Gardner*,²⁵⁰ the court found that a prison policy of conducting digital rectal probes without cause failed the *Turner v. Safley* test because it was not reasonably related to a legitimate penological goal.²⁵¹

In the case of a policy barring access to clinical research, the governmental entity promulgating the regulation would presumably assert that the reason for its regulation is the protection of prisoners against the abuses of biomedical experimentation. As discussed above, however, DHHS regulations implement multiple safeguards to protect prison populations.²⁵² In light of these regulatory requirements and precautions, it will be difficult for prison authorities to justify complete denial of access to clinical trials as a reasonable antidote to prisoner abuse.²⁵³

If promising treatment for a particular disease is available to the inmate only through an experimental study, as is often the case for AIDS patients,²⁵⁴ prisoners will have no alternative and no way to exercise their constitutional right to medical treatment outside of the clinical trial. In some cases, last-chance experimental therapies provided through clinical trials constitute the only meaningful healthcare available to a terminally ill patient. Prisoners seeking participation in such biomedical research will therefore be able to prevail with respect to the second element of the *Safley* test.

The third element of the *Safley* test might provide the greatest hurdle for inmates challenging a prison regulation that prohibits access to clinical trials, but it should not be insurmountable. Prison officials might argue that accommodation of the prisoner's desire to participate in a study may have an adverse impact on guards, other inmates, and prison resources. The prison may contend that special treatment of some prisoners for medical research purposes might cause jealousy among inmates, require additional security measures for prisoners transported to and from the medical site, and result in added costs for the correctional facility.

The inconvenience for correctional institutions allowing prisoner participation in clinical trials, however, should be minimal. Under FDA regulations, sponsors of drug studies are generally required to pay for the investigational drugs provided in trials.²⁵⁵ Consequently, the drug companies

249. *See id.*

250. 854 F. Supp. 725 (E.D. Wa. 1994).

251. *See id.* at 726.

252. *See discussion supra* Part III.

253. The state might also argue that the regulation is necessary for security and cost reasons. Allowing an inmate to leave the prison in order to receive the experimental treatment could potentially raise expenses and security concerns for prison authorities. These arguments are addressed with respect to the third element of the *Safley* test below.

254. *See Kelly, supra* note 131.

255. *See* 21 C.F.R. § 312.7(d)(1)(1999). "Charging for an investigational drug in a clinical trial under an IND is not permitted without the prior written approval of FDA. In requesting such

themselves pay for the treatment of prisoners who receive experimental therapy in clinical research.²⁵⁶ Moreover, during the 1960s, prior to the constraints imposed by federal regulations, drug companies competed for access to prisoner populations.²⁵⁷ Upjohn and Parke-Davis built a state of the art laboratory inside the State Prison of Southern Michigan at Jackson.²⁵⁸ If researchers were encouraged to utilize prisoners in clinical trials that would benefit both the sponsors and the prisoners, as required by the regulations, drug companies and research institutions may once again be eager to provide medical facilities within the prisons at which the studies would be conducted. In the past decade, researchers in Maryland and Colorado have in fact conducted AIDS-related clinical trials at correctional facilities.²⁵⁹ At other locations, clinical studies have taken place at hospitals that provide routine medical services to prisoners and to which prisoners are transported for healthcare on a regular basis.²⁶⁰

In addition, experience has shown that prisoners do not vie with one another for the opportunity to be research subjects and that there is often a dearth of inmates willing to participate in clinical research.²⁶¹ Therefore, it is unlikely that the availability of experimental protocols for seriously ill inmates will be perceived as favoritism and cause morale problems within the prison. On the contrary, all prisoners might be reassured by the enhanced quality of the medical care and the new treatment opportunities available at the correctional facility. The cost and inconvenience for prison authorities would thus be slight.

With respect to the fourth element of the *Safley* test, it should not be difficult to show that prison authorities wishing to protect prisoners from coerced or uninformed participation in clinical research or from abusive medical practices have ready alternatives to an absolute ban on access to clinical studies. Prison authorities could ensure that an appropriately constituted IRB has approved the proposed clinical study and that all other regulatory requirements are being followed by those conducting the research. In this manner, prison officials will be able to protect the prison population without denying seriously ill patients potentially life-saving therapy.

approval, the sponsor shall provide a full written explanation of why charging is necessary in order for the sponsor to undertake or continue the clinical trial, e.g., why distribution of the drug to test subjects should not be considered part of the normal cost of doing business." *Id.*

256. See *id.* If the inmate receives standard therapy in a control arm, the drug sponsor does not have to cover the expense. However, this does not add costs for the state since the patient would have to be treated with standard therapy at the state's expense if no experimental therapy were available.

257. See HORNBLUM, *supra* note 5, at 103.

258. See *id.*

259. See Kelly, *supra* note 131, at 61.

260. See *id.* at 60.

261. See *Bailey v. Lally*, 481 F. Supp. 203, 220 (D. Md. 1979); STEIN & HEADLEY, *supra* note 152, at 21 ("The [prison] population is not very anxious to participate.").

*B. The Fourteenth Amendment Does Not Bar Prisoner Access to
Experimental Treatment and May, in Fact, Mandate
Inmates' Inclusion in Clinical Trials*

1. *Due Process and Equal Protection.*—The Fourteenth Amendment provides that no state may “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁶² The Supreme Court has stated that “[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’²⁶³ . . . or are ‘implicit in the concept of ordered liberty.’”²⁶⁴ Traditionally, the Supreme Court has held that a state violates substantive due process when its acts “shock the conscience” of humanity.²⁶⁵

Governmental action is subjected to strict scrutiny if it impermissibly interferes with the exercise of a fundamental right or disadvantages a suspect class.²⁶⁶ If no fundamental right or particular suspect class is adversely affected, the challenged governmental action will be assessed under “rational basis scrutiny” to determine whether it bears a rational relationship to a legitimate governmental interest.²⁶⁷ The Supreme Court has determined that the fundamental rights protected by the Due Process Clause include the rights to marry, to marital privacy and contraception, to abortion, to have children, to control the education and upbringing of one’s children, to bodily integrity, and to refuse unwanted lifesaving medical treatment.²⁶⁸ The suspect classifications that warrant strict scrutiny under the Equal Protection Clause are race, alienage, and national origin.²⁶⁹

The *Bailey*²⁷⁰ court held that the defendants’ conduct did not rise to the level of a constitutional due process violation.²⁷¹ The court acknowledged that some of the living conditions that were prevalent at MHC at the time were unacceptable and, that the research studies offered prisoners a partial escape from

262. U.S. CONST. amend. XIV.

263. *Rochin v. California*, 342 U.S. 165, 169 (1951) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

264. *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

265. *See Bailey*, 481 F. Supp. at 219 (citing *Rochin*, 342 U.S. at 172).

266. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

267. *See Harris v. McRae*, 448 U.S. 297, 326 (1980).

268. *See Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

269. *See Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). An intermediate level of scrutiny has been applied in cases involving classification based on sex or illegitimacy. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). To be upheld, a classification analyzed under the intermediate level of scrutiny must be substantially related to an important governmental objective. *See id.*

270. 481 F. Supp. at 203.

271. *See id.* at 225.

those conditions and an opportunity for higher earnings.²⁷² These circumstances suggest that the prisoners might have enrolled in the clinical trials not because they wished to participate in the biomedical research and understood its purpose and implications, but solely because they hoped to escape some of the intolerable prison conditions. Prisoners who underwent experimentation for which they did not provide meaningful consent arguably suffered a violation of their right to bodily integrity or liberty. Nevertheless, considering all the evidence in the case and the informed consent provided by participants, the court found that the inclusion of inmates in the medical experiments at issue did not "shock the conscience" or defy constitutional standards.²⁷³

On the other hand, prisoners who desire access to experimental treatment and are denied permission to participate in a clinical trial may be able to establish that their exclusion from therapeutic medical research violates the Fourteenth Amendment. Although federal law permits the inclusion of prisoners in clinical trials in limited circumstances, state laws and correctional policies continue to prohibit prisoners' access to biomedical studies in many jurisdictions.²⁷⁴ Prisoners may challenge state laws or regulations barring access to clinical trials by asserting that the state action violates the due process and equal protection clauses of the Fourteenth Amendment. They may contend that the state is depriving them of the liberty to enjoy the benefits of clinical research or is endangering their lives if it is precluding access to potentially life-saving treatment. Likewise, they may argue that they are subjected to unequal treatment based on their status as prisoners.

In *Fante v. Department of Health and Human Services*,²⁷⁵ prisoners from the State Prison of Southern Michigan at Jackson challenged proposed FDA regulations limiting prisoner access to clinical trials on due process and equal protection grounds.²⁷⁶ Cecil Cone, an inmate who had volunteered to participate in trials involving radioactive tracers, tuberculosis tests, medicated skin lotions, and antacids, stated that he wished to continue participating in nontherapeutic studies because they relieved the sheer boredom of prison life and allowed him to supplement his meager prison income.²⁷⁷ The drug testing, according to Cone, provided "a change of pace. It's like a little vacation."²⁷⁸ In addition, the money provided a powerful incentive.²⁷⁹ The FDA apparently found the prisoners' arguments to be compelling because it withdrew its proposed regulations and

272. See *id.* at 219.

273. See *id.*

274. See Kelly, *supra* note 131, at 58.

275. Civil Action No. 80-727788 (E.D. Mich. filed July 29, 1980), cited in 46 Fed. Reg. 35085 (1981).

276. See Schroeder, *supra* note 3, at 986.

277. See Marjorie Sun, *Inmates Sue to Keep Research in Prisons*, 212 SCIENCE 650, 650 (May 8, 1981).

278. *Id.*

279. See *id.*

never reissued a different proposal.²⁸⁰ However, no court decision was issued regarding the question of the prisoners' constitutional rights.

The prisoners in the *Fante* case argued that the proposed FDA regulations would deprive them of the liberty to enjoy the benefits of clinical research without due process of law and that they were denied the equal protection of the law because of their status as prisoners.²⁸¹ Seriously ill prisoners seeking participation in clinical trials for medical reasons rather than for income or a break from routine would have a far more persuasive argument than did the *Fante* plaintiffs and may well be able to prevail in a court action.

It must be noted, however, that it will be difficult to establish the existence of a fundamental right of access to clinical trials for incarcerated individuals. Although prisoners have a constitutional right to receive medical care in prison,²⁸² no court has deemed this fundamental right to extend to nonconventional, experimental treatments. In addition, prisoners are not among the identified suspect classes and thus are not entitled to heightened scrutiny under the Equal Protection Clause.²⁸³ State laws or correctional policies prohibiting the participation of prisoners in biomedical studies would therefore be analyzed under the rational basis test.

In defending a Fourteenth Amendment claim, the state would presumably argue that its reason for precluding prisoners from involvement in biomedical research is to protect them from coerced or uninformed participation or from the abuses of irresponsible research. As discussed above, however, existing federal regulations provide numerous safeguards against research abuses so long as they are conscientiously implemented by IRBs.²⁸⁴ The regulations mandate that prisoners can participate only in studies that will directly benefit the subject or the inmate population in general and prohibit prisoner involvement in nontherapeutic clinical trials.²⁸⁵ Moreover, the regulations implement safeguards relating to IRB review, selection of subjects, informed consent, and the performance of the experimentation.²⁸⁶ In light of these extensive federal regulations, it will be difficult for the state to establish that a complete ban on prisoner studies, including those with life-saving potential, bears a rational relationship to the goal of providing prisoners with meaningful protection.²⁸⁷ A state law or policy barring prisoner access to potentially life-saving experimental therapy may consequently be revoked even under Due Process or Equal Protection "rational basis" scrutiny.

280. See Kelly, *supra* note 131, at 56.

281. See Sun, *supra* note 277, at 650.

282. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

283. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

284. See discussion *supra* Part III.

285. See 45 C.F.R. § 46.306 (1998).

286. See *id.* §§ 46.304, 46.305.

287. If the state argues that its ban is motivated by concerns about cost and security, these arguments too will prove weak and could be defeated under the rational basis test. See discussion *supra* Part IV.

It is tempting to assert an Equal Protection argument based on the reality that minorities are disproportionately affected by bans on studies involving prisoners. This argument, however, is destined to fail.

Scholars have noted that African Americans and Hispanics constitute a disproportionately large percentage of the prison population, compared to their general population rates.²⁸⁸ African Americans make up approximately half of the United States' 1.8 prison population, and Hispanics account for fifteen percent, while only twelve percent of the U.S. population is Black, and eleven percent is Hispanic.²⁸⁹ AIDS and other diseases also affect African Americans and Hispanics disproportionately.²⁹⁰ As of June 1994, fifty percent of all AIDS patients were Black or Hispanic.²⁹¹ By 1998 Blacks accounted for forty-nine percent of AIDS deaths, and eighteen percent of AIDS deaths were among Hispanics.²⁹² Black men have a higher risk of cancer and cirrhosis of the liver than non-African American men, and Hispanics report higher rates of heart disease, cancer, and chronic liver disease than do non-Hispanics.²⁹³

No constitutional claim can be based on these statistics. The Constitution prohibits only purposeful discrimination, and facially neutral governmental actions cannot be constitutionally challenged using a disparate impact theory.²⁹⁴ Nevertheless, the fact that minorities are disproportionately affected by both imprisonment and particular diseases, provides a compelling reason for the inclusion of inmates in clinical studies, as will be discussed in Part V.A below.

2. *The Right to Privacy.*—The constitutional right to privacy is somewhat amorphous and may be rooted in a variety of provisions.²⁹⁵ The right to privacy has been described most often as stemming from the Fourteenth Amendment's concept of personal liberty.²⁹⁶ It may also be found in the Ninth Amendment's reservation of rights to the people.²⁹⁷ In *Griswold v. Connecticut*,²⁹⁸ the Supreme Court determined that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."²⁹⁹ The right to privacy also includes the right to be free from governmental surveillance and intrusion in one's private affairs, which stems from the Fourth Amendment.³⁰⁰

288. See Kelly, *supra* note 131, at 51.

289. See Michael A. Fletcher, *The Crime Conundrum; Policing Is Tougher, Jails Fuller, and Crime Is at a 30-Year Low*, WASH. POST, Jan. 16, 2000, at F1; Shapiro, *supra* note 16, at 2A.

290. See Fletcher, *supra* note 289, at F1; Shapiro, *supra* note 16, at 2A.

291. See Fletcher, *supra* note 289, at F1; Shapiro, *supra* note 16, at 2A.

292. See Karen Gullo, *Clinton to Seek AIDS Funds*, AP ONLINE, Jan. 18, 2000 (citing CDC figures).

293. See Marquart et al., *supra* note 208, at 188.

294. See *Washington v. Davis*, 426 U.S. 229 (1976).

295. See *Whalen v. Roe*, 429 U.S. 589, 598-99 nn.23-25 (1977).

296. See *id.* n.23 (citing *Roe v. Wade*, 410 U.S. 110, 153 (1973)).

297. See *id.*

298. 381 U.S. 479 (1965).

299. *Id.* at 483.

300. See *Whalen*, 429 U.S. at 599 n.25.

The right to privacy generally encompasses the right to maintain confidentiality regarding medical information, and some courts have held that even prisoners enjoy this right, particularly with respect to HIV status.³⁰¹ Other courts have found, however, that inmates do not retain a constitutional right to the confidentiality of their medical records.³⁰² Prisoners do, nonetheless, have a restricted constitutional right to bodily privacy.³⁰³

The *Bailey*³⁰⁴ court only briefly addressed the privacy issue. It found the plaintiffs' privacy claims to be unfounded because the prisoners volunteered for the experimental procedures at issue and were not subjected to involuntary treatment as was the case in the precedents they cited.³⁰⁵ Likewise, under contemporary regulatory guidelines, prisoner enrollment cannot be coerced. Thus, it is highly unlikely that biomedical research will give rise to violation of constitutional privacy rights.

A related but different claim may arise from the Fourth Amendment, which establishes "[t]he right of the people to be secure . . . against unreasonable searches and seizures."³⁰⁶ Invasive medical procedures, such as blood tests, can constitute searches and seizures that impinge upon the constitutional rights of the patient, even in the prison context.³⁰⁷ The *Bailey* court did not address any potential search and seizure claims. Nevertheless, if bodily fluids are extracted from prisoners who have not provided informed consent, Fourth Amendment violations may arise. Clinical studies that comply with DHHS regulations requiring voluntariness and informed consent, however, should not infringe upon any participant's right to be free of unreasonable searches and seizures.

If prisoners provide genuine informed consent to biomedical experimentation, if the study is thoroughly reviewed by an IRB, and if the research conforms to the guidelines of federal regulations, then sufficient safeguards will be implemented to assure that the subjects' rights to bodily integrity and privacy will not be sacrificed. Nevertheless, a significant concern exists that adequate confidentiality regarding medical records may not be maintained in the prison setting. The DHHS regulations governing research involving inmates do not address the issue of confidentiality.³⁰⁸ As discussed below, precautions must be taken to assure confidentiality for inmate participants.

301. See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1041 (S.D.N.Y. 1995); *Nolley v. County of Erie*, 776 F. Supp. 715, 729-31 (W.D.N.Y. 1991).

302. See *Tokar v. Armontrout*, 97 F.3d 1078, 1084 (8th Cir. 1996); *Anderson v. Romero*, 72 F.3d 518, 524 (7th Cir. 1995).

303. See *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992).

304. *Bailey v. Lally*, 481 F. Supp. 203 (D. Md. 1979).

305. See *id.* at 221.

306. U.S. CONST. amend. IV.

307. See *Stanley v. Swinson*, No. 93-16078, 1995 WL 46181, at *4 (9th Cir. Feb. 6, 1995); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989).

308. See discussion *supra* Part III.

Constitutional concerns do not justify the exclusion of prisoners from medical research. It is arguable that the Eighth and Fourteenth Amendments mandate the provision of life saving therapy to seriously ill prisoners even if the treatment is available only through a clinical trial. While inmate participation in clinical trials may be hampered by certain practical hurdles, these obstacles are not insurmountable, as demonstrated by several programs that successfully integrate prisoners into research protocols.³⁰⁹ The following section will discuss the experience of medical institutions that include prisoners in therapeutic clinical studies and will outline recommendations to facilitate the implementation of such programs.

V. POLICY ISSUES AND RECOMMENDATIONS

A. *Several Jurisdictions Recognize the Importance of Including Prisoners in Clinical Trials*

In July 1995 the New Jersey Community Research Initiative issued a report entitled *Prisoners with HIV: Guidelines for Implementing Clinical Trials in Correctional Settings*.³¹⁰ The report found that “[m]any leaders in medical ethics have concluded that the coercive nature of correctional settings should not prevent prisoners from participating in medically appropriate clinical studies.”³¹¹ It cited the findings of a 1989 consensus panel of leaders in corrections, prison health care, and public health that likewise found that “although a prison setting precludes the voluntary and uncoerced choice classically envisioned by the federal regulations, prisoners should be permitted to choose to participate in therapeutic trials . . . that hold out the possibility of benefit.”³¹² The report further noted that “public health officials, including the World Health Organization and the former National Commission on AIDS, have advocated prisoner access to clinical research.”³¹³

Including prisoners in biomedical studies is important for reasons that go beyond benefits to the subjects themselves. Traditionally, African Americans, Hispanics, intravenous drug users, and women have been underrepresented in clinical trials.³¹⁴ Two important studies in which AZT was tested were conducted with a population that was more than ninety-two percent White and male.³¹⁵ A 1991 report produced by the AIDS Clinical Trial Group concluded that African Americans made up only ten percent of participants in this national consortium of clinical trials, Hispanics twelve percent, and IV drug users and

309. See Kelly, *supra* note 131, at 60.

310. STEIN & HEADLEY, *supra* note 152.

311. *Id.* at 3.

312. *Id.*

313. *Id.*

314. See Kelly, *supra* note 131, at 51.

315. See *id.*

women accounted for eleven percent and six percent, respectively.³¹⁶

Researchers have found that members of different races at times respond to treatments in different ways.³¹⁷ Whites and Blacks, for example, respond differently to hypertensive therapy.³¹⁸ Women may respond differently from men because of variations in size, body fat, and hormonal levels.³¹⁹ Similarly, the efficacy of drugs may be significantly affected by other drugs, including illegal substances taken by the patient.³²⁰ Exclusion of minority subjects from drug studies is thus "bad science" and will adversely impact both the researcher and future patients.³²¹ The prison environment provides a diverse population, with a high concentration of minorities. Allowing prisoners to participate in therapeutic clinical studies will benefit not only the inmate patients, but also the medical community and society at large.

Research institutions in several states have succeeded in integrating prisoners into clinical trials. In Texas, Virginia, and New York research entities provided standard medical care to prisoners before establishing programs that included inmates in clinical studies.³²² In Texas, the University of Texas Medical Branch at Galveston ("UTMB") has served as the primary prison hospital for the Texas Department of Criminal Justice ("TDCJ") since 1983.³²³ It is staffed by security personnel who report to TDCJ and health care professionals who answer to the University.³²⁴ For many years, Texas inmates have been enrolled in clinical trials involving protocols that may be of direct benefit to them.³²⁵ Historically, the majority of the studies at UTMB in which prisoners have been included have been cancer-related, but an increasing number in recent years have focused on AIDS treatment.³²⁶

In New York City, the Spellman Center for HIV-Related Disease at St. Clare's Hospital has provided care to many HIV-infected New York inmates and involved prisoners in clinical trials for several years beginning in 1986.³²⁷ In Albany, New York, Albany Medical College provides hospital care for prisoners in twenty-five correctional facilities.³²⁸ The facility began enrolling prisoners in AIDS-related trials in 1988 and included inmates in oncologic clinical trials in

316. *See id.* at 52.

317. *See id.*

318. *See id.*

319. *See id.*

320. *See id.*

321. *See id.*

322. *See id.* at 60.

323. *See id.*

324. *See id.*

325. *See id.*

326. *See id.* As of 1992, over 500 TDCJ inmates had participated in clinical trials at UTMB.
See id.

327. *See id.*

328. *See id.*

prior years.³²⁹ The Division of Infectious Diseases at the Medical College of Virginia has served the Virginia state prison population since 1985 and has enrolled prisoners in clinical trials since 1990.³³⁰

Not all research institutions that include inmates in medical studies provide healthcare services to prisoners outside of clinical trials.³³¹ Johns Hopkins University in Maryland has established several AIDS-related clinical trials in Maryland prisons since 1991, although it is not otherwise a provider of treatment for Maryland prisoners.³³² In Colorado, the Department of Health has also allowed prisoner participation in AIDS-related trials.³³³ Likewise, Yale University Medical School has worked with prisoners in medical research studies.³³⁴

B. The Challenges of Prisoner Involvement in Clinical Trials

The commentators who advocate the inclusion of prisoners in clinical studies recognize the existence of certain obstacles inherent to the prison setting.³³⁵ Nevertheless, the obstacles are not insurmountable, as evidenced by the fact that research is successfully conducted by some institutions, as discussed above.

1. *Confidentiality*.—Prisoners participating in AIDS-related clinical trials risk disclosure of their HIV status either because it is obvious that they are receiving frequent and specialized medical care or because of the prison's record-keeping policies.³³⁶ Disclosure of HIV status may be particularly dangerous for inmates because of the risk that other prisoners or correctional officers will subject the patient to persecution and violence.³³⁷

The Forum on Prisoner Access to Clinical Trials in New Jersey acknowledged that maintaining fully effective confidentiality in the prison setting is nearly impossible.³³⁸ However, it suggested several alternatives to safeguard the privacy of research participants. Although it is not clear that prisoners retain a right to confidentiality regarding HIV status,³³⁹ every effort should be made to prevent disclosure of inmates' receipt of HIV-related experimental therapy. Such precautions will safeguard the prisoners' constitutional rights to the extent they exist, will encourage inmates to participate in clinical trials, and will reduce prisoner grievances and litigation regarding confidentiality matters. Where the research institution provides routine medical care to inmates and frequently sends

329. *See id.* at 60-61.

330. *See id.* at 61.

331. *See id.*

332. *See id.*

333. *See id.*

334. *See* STEIN & HEADLEY, *supra* note 152, at 7.

335. *See* Kelly, *supra* note 131, at 61-64; STEIN & HEADLEY, *supra* note 152, at 23-26.

336. *See* Kelly, *supra* note 131, at 63-64.

337. *See id.* at 64.

338. *See* STEIN & HEADLEY, *supra* note 152, at 23.

339. *See* discussion *supra* Part IV.B.2.

staff to the correctional facility, it is easiest to maintain confidentiality for clinical trial enrollees. Inmates should be allowed to communicate directly with investigators about clinical trials without having to request permission from prison officials.³⁴⁰ Investigators could publicize the research through newsletters or postings that are seen by all inmates. Enrollment could then occur during a routine medical visit by the institution's staff rather than on a day specifically designated for discussion of the AIDS-related study.³⁴¹

Moreover, the Forum on Prisoner Access to Clinical Trials recommends that medical records that contain information about HIV status be maintained in secured areas that can be accessed only by medical personnel directly responsible for the inmate's treatment.³⁴² Correctional officers and other inmates should not have access to sensitive medical records even if they are assigned to work in the prison's medical department.³⁴³

Finally, the Forum suggests that prisoners also have confidential access to investigators in the event that they suffer adverse side effects from investigational drugs.³⁴⁴ Prisoners involved in clinical trials should be allowed to place collect calls to designated medical personnel or to an answering service twenty-four hours a day.³⁴⁵ In Maryland, investigators are available by beeper around the clock.³⁴⁶ Where telephone usage by prisoners is restricted, however, inmates may be limited to reaching research staff through prison medical personnel and thus may be forced to disclose confidential information to correctional officials.³⁴⁷

2. *Logistics and Communication.*—Transportation issues may constitute another hurdle to prisoner participation in biomedical research.³⁴⁸ Where studies are conducted in correctional facilities, researchers must travel to prison clinics, bringing with them all necessary medical equipment and carrying out of the prison bodily fluid samples for testing.³⁴⁹ They must also undergo time-consuming security checks each time they arrive at the prison.³⁵⁰ Where clinical trials are conducted on hospital grounds, prisoners must be transported under guard to and from the hospital. Significant delays are often caused by prison lockdowns, inmate counts, and other security precautions.³⁵¹

Restrictions on items that can be possessed by prisoners may also be problematic for clinical research purposes. Since bottles and pills are contraband

340. See STEIN & HEADLEY, *supra* note 152, at 24.

341. See *id.*

342. See *id.* at 25.

343. See *id.*

344. See *id.* at 26.

345. See *id.*

346. See *id.*

347. See *id.*

348. See Kelly, *supra* note 131, at 62.

349. See *id.*

350. See *id.*

351. See *id.*

in most prisons, procedures must be implemented to allow prisoners to keep experimental drugs with them or to have them administered in a manner that maintains confidentiality.³⁵² In some New Jersey jails prisoners have a self-dosing system for their prescription medications that features locked boxes.³⁵³ A similar mechanism could be implemented in other prisons, though correctional officers would have to be educated to maintain confidentiality regarding the nature of prisoners' medications and any modifications of general prison policies that apply to clinical trial participants.³⁵⁴

Another problem may arise in instances where prisoners are transferred from one facility to another.³⁵⁵ Inmates should be able to continue receiving the experimental treatment at the new facility.³⁵⁶ A "medical hold" could be placed on trial participants designated for relocation so that the central administration, in consultation with medical investigators, may evaluate whether the transfer will cause any adverse consequences to the patient or the research study.³⁵⁷ Thus, prison administrators will avoid potential violation of the inmates' Eighth Amendment right to adequate medical care and will not jeopardize the prisoners' health by sudden and unmonitored discontinuation of experimental treatment.

Similarly, continuity of care should be assured for prisoners who are paroled or released.³⁵⁸ In Maryland, a research nurse meets with the prisoner prior to release and encourages the individual to continue trial participation once released.³⁵⁹ Researchers should offer former prisoners assistance with transportation to and from the research site and work with parole officers to assure appropriate sustained treatment.³⁶⁰

A recent statement issued by the Office of the Inspector General of the U.S. Department of Health and Human Services is highly critical of the institutional review board system.³⁶¹ It noted that a "1995 Advisory Commission on Human Radiation Experiments found in their interviews with actual research subjects that few realized they were participants in research and many had little understanding of the informed consent forms they signed."³⁶² The statement further denounced the limited continuing review conducted by most IRBs that, burdened by ever-increasing workloads, do no more than review paperwork submitted by research investigators and fail to solicit feedback from research

352. See STEIN & HEADLEY, *supra* note 152, at 26.

353. See *id.*

354. See *id.*

355. See *id.* at 35.

356. See *id.*

357. See *id.*

358. See *id.* at 36; Kelly, *supra* note 131, at 63.

359. See STEIN & HEADLEY, *supra* note 152, at 36.

360. See Kelly, *supra* note 131, at 63.

361. See JUNE GIBBS BROWN, OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, INSTITUTIONAL REVIEW BOARDS: A TIME FOR REFORM (1998).

362. *Id.* at 6.

subjects.³⁶³ The Office of the Inspector General also urged research institutions to provide adequate education for IRB members concerning ethical issues and scientific questions and noted that currently IRB training is minimal to nonexistent.³⁶⁴

As discussed throughout this Article, IRBs approving clinical trials involving prisoners must meet stringent requirements that are inapplicable to reviews of other studies. The IRB must include a prisoner advocate, review the proposed study in light of guidelines specific to the prison setting, and provide prisoners with data presented in language that they can understand.³⁶⁵ IRBs are therefore likely to review protocols involving prisoners more meticulously than they might review other research proposals. Nevertheless, the comments of the Office of Inspector General are prudent admonitions for anyone reviewing research protocols designed to include prisoner participants. IRBs should be well versed in the ethical dilemmas that are potentially involved in prisoner research, must ensure that meaningful informed consent is obtained, and should conduct thorough and conscientious continuing reviews of the clinical trials in question.

CONCLUSION

Although federal regulations permit the inclusion of prisoners in therapeutic clinical trials from which they may gain direct treatment benefits, prisoners are able to enroll in clinical trials in only a few locations.³⁶⁶ Although perhaps well-intentioned, policies that ban the inclusion of inmates in biomedical studies are detrimental to prisoners, to science, and to society at large because they preclude research utilizing a particularly diverse and disadvantaged segment of society. In the words of Justice Brandeis:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.³⁶⁷

Clinical trials that comply with federal regulations will not violate any of the participants' constitutional rights. In *Bailey v. Lally*,³⁶⁸ the court found no constitutional violations despite extremely harsh prison conditions that often motivated prisoner participation in research studies that were nontherapeutic and had not been scrutinized by a reviewing entity such as an IRB.³⁶⁹ In light of

363. See *id.* The authors found an average increase in initial reviews of 42% over five years at the sites they visited. Some IRBs currently review more than 2000 protocols a year. See *id.*

364. See *id.* at 11-12.

365. See 45 C.F.R. §§ 46.304-46.306 (1998).

366. See Kelly, *supra* note 131, at 58.

367. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

368. 481 F. Supp. 203 (D. Md. 1979).

369. See *id.*

contemporary regulations, it is difficult to imagine that any subsequent court would deem voluntary participation in therapeutic studies to impinge upon the constitutional rights of an enrollee.

The exclusion of seriously ill prisoners from clinical trials through which they may receive potentially life-saving treatment is constitutionally dubious and morally troubling. It is arguable that prisoners have a right to participation under the Eighth Amendment, the Due Process clause, and the promise of Equal Protection. In addition, moral considerations impel the allowance of prisoner enrollment in therapeutic biomedical research. Two commentators have summarized the arguments well:

Inmates as a group . . . need to be provided with access to clinical trials of new and innovative therapies that present the possibility of direct benefit. . . . They must be presented with the opportunity for informed choice when appropriate, despite recognition that the systematic deprivations and inherent coerciveness of the institutions and the desperate character of HIV infection compromise the consent process. As in other areas of public policy and public health, HIV infection demands a fresh examination of equity and justice. Whether access is provided to promising investigational therapies will measure the mettle, courage, inventiveness, and flexibility of the medical research community. It will also test the humanity of correctional administrators, who must provide the setting and support services to permit the conduct and monitoring of clinical trials.³⁷⁰

Policy makers, legislators, and prison authorities must meet the challenge of providing appropriate treatment for seriously ill prisoners, including that which is available through experimental protocols. To fail to do so would defy the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"³⁷¹ embodied in the Constitution and in American jurisprudence.

370. STEIN & HEADLEY, *supra* note 152, at 38 (quoting Nancy Neveloff Dubler & Victor W. Sidel, *On Research on HIV Infection*, JOURNAL OF ACQUIRED IMMUNE DEFICIENCY SYNDROMES 174, 204 (1994)).

371. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

A CRITIQUE OF THE INTERNAL REVENUE SERVICE'S REFUSAL TO DISCLOSE HOW IT "DETERMINED" A TAX DEFICIENCY, AND OF THE TAX COURT'S ACQUIESCENCE WITH THIS VIEW

MARCUS SCHOENFELD*

INTRODUCTION

The Internal Revenue Service ("Service" or "IRS") enjoys a presumption of correctness in its factual assertions made in Statutory Notices of Deficiency ("Statutory Notice" or "Notice")¹ it sends to taxpayers whom the Service believes owes taxes. While the Notice usually states the reasons for its assertions, sometimes the reasons are not explained or are stated so generally that they are of little use to those taxpayers who must try to disprove these assertions. The issue is seen most pointedly in civil fraud tax cases, especially in multiparty conspiracy civil fraud tax cases.

Due to the clandestine nature of a conspiracy, and the fact that most

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Ryan is a rather typical civil fraud case which follows convictions under the Organized Crime Control Act, Title IX, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1994 & Supp. III 1997) ("RICO"). *Ryan* dealt with four former narcotics officers who had been found guilty of stealing money and drugs and accepting bribes from drug dealers. In addition, they were convicted of willfully filing false tax returns because they did not report the illegal income. See *United States v. Wilson*, 742 F. Supp. 905 (E.D. Pa. 1989) (dealing primarily with joint and several liability for restitution-penalty of RICO conspirators). In addition, a fifth former officer pled guilty to these crimes. After these former officers had served their jail terms, each one received a Statutory Notice asserting deficiencies based upon the profits from the same acts for which they had been convicted criminally. Each filed a petition with the Tax Court, and their cases were consolidated for trial.

Many thanks to my colleague, Professor Michael Mulroney, and to all of the Villanova student-clinicians who contributed greatly to *Ryan* over the several years the case was in the Clinic. In particular, special thanks are due to the students who helped prepare for trial, who tried the case, and who helped with the brief. Their names are listed by the court in *Ryan*, at 1778, n.2. Their thoughts helped form some of the opinions discussed herein. Thanks are also due to several members of the Villanova Law Review who aided with the formatting of this Article. Finally, thanks are due to Ronald Giongo, one of the petitioners in *Ryan*, who consented to this presentation of his case.

1. The Statutory Notice of Deficiency ("Statutory Notice" or "Notice") is authorized by 26 U.S.C. § 6212 (1994). All further references to Title 26 U.S.C. will be cited as, for example, I.R.C. § 6212 (1999).

criminals do not keep records of their illegal income, the Service uses various techniques permitted by the United States Tax Court ("Tax Court") to attempt to prove fraud, and then to prove the amount of each conspirator's unreported fraudulent income. Although these techniques are generally proper, they often yield harsh results, as if conspirators must be "punished" in a civil arena, whether or not they have been punished in a prior criminal trial. These results can be especially severe when applied to a marginal conspirator involved in a large conspiracy.

Because most practitioners have only slight knowledge of the nature of a civil fraud case, Part I of this Article will give an overview of civil fraud tax cases and explain the differences between criminal and civil fraud tax cases.

Part II is a critique of the position taken by the Service, which often refuses to disclose exactly how it calculated the dollar amounts of the taxpayer's asserted tax deficiencies, based upon its overly broad interpretation of case law. This refusal to disclose details seems to be contrary to the discovery rules of the Tax Court; however, the court usually agrees with the Service's position because it does not wish to look into the inner administrative workings of the agency. The taxpayer must then refute the Service's assertions which are presumed to be correct; obviously, the difficulty of disproving these assertions is greatly exacerbated because the taxpayer cannot know how they were determined. The Service seems to take this position primarily to gain adversarial advantage in litigation.

Part III critiques the Service's position that all of its documents are privileged, and therefore not discoverable because they were prepared "in anticipation of litigation," or because the papers are subject to "executive privilege." The Service again seems to take this position primarily to gain adversarial advantage in litigation.

Part IV critiques the Tax Court's position that, because its trial is *de novo*, any administrative errors made by the Service will be corrected at trial. This position clearly ignores the fact that the Service's possible errors cannot be discovered when the taxpayer cannot obtain the discovery as shown in Parts II and III. Additionally, the position further ignores the fact that although the Notice clearly is a procedural necessity for Tax Court jurisdiction, it also carries substantive weight because it is presumed to be correct.

Part V deals with those limited circumstances when the Service's Statutory Notice may be deemed to be "arbitrary and excessive" because it is either unconstitutional or it asserts a "naked assessment."

Part VI deals with the problems that allegedly fraudulent taxpayers incur when multiple petitioners are before the court. Part VII critiques the onerous burden placed on each of these multiple parties due to the Service's so-called "protective position," in which multiple redundant assertions of the same income is made to several taxpayers.

Part VIII then reviews the concepts of collateral estoppel, as the Service uses it to bear its burden of proving fraud, whenever there has been a prior criminal conviction of the petitioner.

Part IX addresses the "badges of fraud," and their use by the Service in satisfying its burden to prove fraud.

Finally, the conclusion and suggestions for change follow.

I. CIVIL AND CRIMINAL TAX FRAUD CASES: A BASIC OVERVIEW

Federal income tax fraud consists of two types: criminal and civil.² The elements of the two types of tax fraud are identical; only the degree of required proof, and the possible consequences differ.³ The elements of fraud include:

1. wilfully making a knowing falsehood;
2. an underpayment; and
3. an intent to evade.⁴

A. Criminal Tax Fraud Cases

Criminal tax fraud⁵ is prosecuted by the Tax Division of the Department of Justice,⁶ or, in some larger cities, by the local United States Attorney. Trials are held in a United States District Court, with a jury if requested.⁷ As with any crime, fraud must be proven "beyond a reasonable doubt."⁸ Incarceration and

2. See *Helvering v. Mitchell*, 303 U.S. 391, 396-97 (1938) (examining elements of both civil and criminal tax fraud and holding prior criminal acquittal does not bar civil case because of differing burdens of proof); see also *Gray v. Commissioner*, 708 F.2d 243, 246 (6th Cir. 1983) (holding that taxpayer who previously pled guilty to criminal tax fraud is conclusively liable for civil tax fraud because elements are identical); *Lydon v. Commissioner*, 351 F.2d 539, 545 (7th Cir. 1965) (noting that acquittal from criminal tax fraud charges does not bar civil tax fraud charges, even though elements are the same, because of differences in standard of proof (citing *Helvering*)).

3. See *Gray*, 708 F.2d at 243; see also *Fontneau v. United States*, 654 F.2d 8, 10 (1st Cir. 1981) (applying doctrine of collateral estoppel to find taxpayer liable for civil tax fraud after plea of guilty to criminal tax fraud because elements are the same).

4. See *Considine v. United States*, 645 F.2d 925, 928-29 (Ct. Cl. 1981) (comparing elements of crime of filing a false return and of civil fraud and rejecting contention that there are significant differences). But see *Wright v. Commissioner*, 84 T.C. 636, 643 (1985) (holding that the elements of tax fraud, criminal as well as civil, were broader than the elements of the crime of filing a false return because fraud requires the intent to evade). *Wright* is more fully discussed at *infra* notes 195-205 and accompanying text.

5. See I.R.C. § 7201 (1999) which states in pertinent part:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Id.

6. 28 C.F.R. § 0.70 (1999) (assigning prosecution of criminal tax cases to Assistant Attorney General, Tax Division).

7. See U.S. CONST. amend. VI (providing for right to jury of peers).

8. *Holland v. United States*, 348 U.S. 121, 126 (1954) (noting that, in criminal tax fraud cases, Service must prove taxpayer's guilt beyond a reasonable doubt, unlike civil tax fraud cases

large monetary fines can be imposed.⁹ Any appeal goes to the United States Court of Appeals of the appropriate circuit.¹⁰

In a criminal tax fraud case, as in any criminal case, if the defendant cannot afford a private attorney, the court will appoint counsel to comply with the Constitutional requirements of due process and the right to counsel for indigent defendants.¹¹ The court appointed attorneys usually are criminal defense attorneys who generally have no specific training in tax.¹² In addition to free representation, indigent criminal defendants are entitled to a transcript of their trial at no cost.¹³

B. Civil Tax Fraud Cases

Unlike criminal tax fraud cases, neither attorneys' fees nor a free transcript is available for indigent civil fraud petitioners because the Constitutional protections for criminal defendants generally do not apply to civil matters.¹⁴

Any civil tax case, whether fraud is alleged or not, usually begins when a taxpayer and the Service cannot administratively agree on the taxpayer's tax liability. To break this impasse, the Service will issue a Statutory Notice of

where Service has the initial burden of proving fraud only by clear and convincing evidence); *see also* *United States v. Schipani*, 293 F. Supp. 156, 161 (E.D.N.Y. 1968) (concluding that Service proved, with substantial evidence, defendant's guilt beyond reasonable doubt).

9. *See* I.R.C. § 7201 (individual convicted of criminal tax fraud can be liable for \$100,000 fine, five years in prison, or both). *But see* 18 U.S.C. § 3571(b)(3) (1994 & Supp. 1997) (raising fine for individual up to \$250,000).

10. *See* FED. R. APP. P. 2, 4(b) (establishing procedure for appeal of criminal conviction).

11. *See* U.S. CONST. amend. V, VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963) (due process requires indigent felony defendant to be furnished counsel). *See generally* Michael E. Tigar, *Constitutional Rights of Criminal Tax Defendants: A Bicentennial Survey and Modest Proposal*, 41 TAX LAW. 13 (1987) (examining consequences of constitutional interpretations on criminal tax proceedings).

12. *See* Theodore Tannenwald, Jr. & Mary Ann Cohen, *Tax Lawyering: A Changing Profession, A Dialogue Between Tax Court Judges*, 46 TAX LAW. 672, 673 (1993) ("[T]he taxpayer's representative is frequently a general practitioner who has little, if any, knowledge of the specific statutory provision or the underlying foundation of the case under the tax law."). Most tax lawyers have little, if any, experience with criminal trials. A criminal fraud trial is first and foremost a criminal matter that just happens to deal with tax matters.

13. *See* *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (holding that constitutional rights of due process and equal protection require government to furnish criminal defendants with a copy of the trial transcript, or equivalent, at no cost to defendant).

14. *See* *Harper v. Commissioner*, 54 T.C. 1121, 1137 (1970) (noting that Fifth and Sixth Amendments of Constitution are generally not applicable in civil cases, distinguishing *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964)). But persons may still refuse to testify against themselves as long as possibility of future criminal prosecution exists. *See id.*

Deficiency ("Statutory Notice" or "Notice")¹⁵ which normally states the dollar amount the Service asserts that the taxpayer owes, together with the supporting schedules showing the Service's reasons for the added tax. No "assessment"¹⁶ may be made without the Service issuing such a Notice, and the tax still may not be assessed for ninety days after sending the Notice.¹⁷ Within those ninety days, the taxpayer may file a petition with the Tax Court; if he does, no assessment may be made until the court's decision is final.¹⁸ If he does not so file, the Service may assess the tax following the ninetieth day after the Notice is sent.

If a petition is filed timely with the Tax Court, the taxpayer must choose the location of the trial from one of approximately thirty cities to which the court travels. The District Counsel of the Internal Revenue Service¹⁹ for that city will answer on behalf of the Service.²⁰

The Notice may also assert that an "addition to tax" (often called a "penalty") is due because the taxpayer is alleged to have been fraudulent.²¹ In virtually all civil fraud cases, the taxpayer must litigate in the Tax Court, because paying the entire sum asserted and suing for a refund may be literally impossible.²²

15. See *supra* note 1.

16. A deficiency assessment pursuant to I.R.C. § 6201 (1999) is a recording of the taxpayer's liability for a given taxable year; it is not a public document, but it is entered within the Service's records. See I.R.C. § 6203; Treas. Reg. § 301.6203-1 (as amended in 1960).

No assessment (other than a jeopardy assessment pursuant to I.R.C. § 6331, which is beyond the scope of this Article) may be made before the taxpayer is sent a Statutory Notice of intent to assess, pursuant to I.R.C. § 6212. This Notice states that if the taxpayer does not submit a petition to the Tax Court within 90 days, see I.R.C. § 6213, assessment may be made on the 91st day after the mailing of the Notice. If a petition is filed with the Tax Court, no assessment may be made until the Tax Court's decision becomes final. See I.R.C. § 7481.

Assessment creates a debt owed by the taxpayer to the Treasury. See *Bull v. United States*, 295 U.S. 247, 259 (1935). This debt may be collected by levy. I.R.C. § 6331.

17. See I.R.C. § 6213 (a) (this issue is the same before and after amendment in 1998 by P.L. 105-206).

18. See *id.*

19. In the Tax Court the Service is represented by the local Office of the District Counsel, a subordinate of the Office of General Counsel to the Internal Revenue Service.

20. I.R.C. §§ 7444 & 7460 authorizes the chief judge to form "divisions" of the court. Typically one judge will be assigned as a "division" to each of approximately thirty cities in which the court sits. Some of the larger cities have more than one session per year.

21. This Article deals only with the addition to tax due to fraud under I.R.C. § 6663. Other additions to tax, such as the accuracy-related penalty of I.R.C. § 6662 and the failure to file or pay penalty of I.R.C. § 6651 are beyond the scope of this Article.

22. In theory, one could pay the entire deficiency asserted and sue for a refund in the United States District Court (where there is a right to a jury) or in the United States Court of Federal Claims. See 28 U.S.C. § 1346 (a) (1) (1994). However, in *Flora v. United States*, 362 U.S. 145 (1960), the Court ruled that the entire tax assessed must be paid before a refund suit may be brought.

In addition, in the vast majority of civil fraud cases, taxpayers simply cannot afford to pay for private counsel, therefore they must appear pro se.²³ Aside from the fact that any pro se taxpayer has many distinct disadvantages when he is opposed by an attorney for the Service, he may concede matters that should perhaps have been tried, and he may feel pressured to accept the Service's settlement offers, even if they otherwise would seem unreasonable. In addition, since most cases dealing with civil fraud are pro se, the precedential value of such cases should be diminished. When they are not, the path is made more difficult for future litigants.

Moreover, an indigent petitioner's inability to acquire a free transcript after trial greatly hampers a petitioner's case because the cost of obtaining a transcript may be prohibitive.²⁴ The lack of availability of a transcript may render

In a typical conspiracy case, the dollar amount of the deficiency may be so high that the taxpayer could not possibly pay the amount of tax plus penalties plus interest. This problem is exacerbated by the Service's "protective position," see *infra* Part VII for discussion of protective position, in conspiracy cases by which the Service redundantly attributes all, or almost all, of the income of the conspiracy to *each* conspirator.

There is a split of authority concerning whether payment of the statutory interest imposed by I.R.C. § 6601 or any payment of additions to tax ("penalties") imposed by I.R.C. § 6663 is a condition precedent to a refund suit. In *Flora*, it was suggested that interest need not be paid before filing suit. See *Flora*, 362 U.S. at 171 n.37 ¶ d.

See *Shore v. United States*, 9 F.3d 1524 (Fed. Cir. 1993) (penalties and interest prepayment not jurisdictional prerequisite to refund suit); *Kell-Strom Tool Co. v. United States*, 205 F. Supp. 190 (D. Conn. 1962) (holding interest need not be paid before refund suit is brought; penalties not in issue); *Magee v. United States*, 24 Cl. Ct. 511 (1991) (jurisdiction proper even though fraud penalty was not paid). But see *D.J. Lambropoulos v. United States*, 18 Cl. Ct. 235 (1989) (penalties and interest must be paid before refund suit can be brought); *Arnold v. United States*, 82-2 U.S.T.C. ¶ 13,476 (N.D. Ohio 1982) (penalty paid; nonpayment of interest bar to refund suit); *Horkey v. United States*, 715 F. Supp. 259 (1989) (paid deficiency but not fraud penalty; held, no jurisdiction).

23. See Christopher Paul Sorrow, Note, *The New Al Capone Laws and the Double Jeopardy Implications of Taxing Illegal Drugs*, 4 S. CAL. INTERDISC. L.J. 323, 336-37 (1995) (noting that expense and ordeal of civil tax prosecution can be as punishing as criminal tax prosecution); see also Kathleen H. Musslewhite, Comment, *The Application of Collateral Estoppel in the Tax Fraud Context: Does It Meet the Requirements of Fairness and Equity?*, 33 AM. U. L. REV. 643, 653 n.62 (1984) (stating that criminal tax defense trials can also be very expensive, upwards of \$15,000). Today the cost would be significantly higher than in 1984. Although a taxpayer's civil case might cost less than a criminal case, the legal expenses may total much more than the deficiency asserted. Additionally, the attorney's fee must be paid whether the petitioner wins or loses a civil case.

24. In *Ryan v. Commissioner*, 75 T.C.M. (CCH) 1778 (1998), the transcript cost almost \$7000. Many petitioners in consolidated civil fraud cases cannot afford this sum because the profits of the enterprise have been spent or confiscated, and, as felons, they have low level jobs and income. Note that if a taxpayer prevails on appeal, he is entitled to "costs," which include the costs of printing the transcript and appendix on appeal. See *Toner v. Commissioner*, 76 T.C. 217 (1981). However, the court denies any award for the cost of obtaining the transcript from the reporter. See

petitioner's brief in the Tax Court, and also on appeal, ineffective because no specific references to the testimony are possible in the brief without the transcript.

The trial of a civil fraud case usually begins with the Service attempting to satisfy its burden of proving fraud by "clear and convincing evidence."²⁵ If the Service cannot prove fraud by this requisite standard, the taxpayer prevails.²⁶ Fraud cannot be presumed.²⁷ Once the Service has borne its burden of proving fraud, the petitioner must then bear the burden of *disproving* the amount of the deficiency asserted by a preponderance of the evidence.²⁸

The taxpayer, if found fraudulent, must thereafter bear the burden of disproving the facts asserted in the Statutory Notice.²⁹ To the extent that he cannot rebut the assertions in the Notice, he faces payment not only of the tax owed on his increased taxable income, but also a civil penalty of seventy-five percent of that additional tax on the fraudulent portion of unreported income.³⁰

id. Of course, if the Service prevails, it is entitled to these costs.

Note that the transcript of a Tax Court trial may be inspected only in the office of the clerk of the Tax Court in Washington. It may not be photocopied there, under the contract between the court and the private court reporter company. No copy is available in the city in which the trial was held. Thus, unless one can spend much time reading and taking notes in Washington, purchasing the transcript from the court reporter is the only way to obtain the transcript.

25. I.R.C. § 6663 (b) (added by OMBRA 1989). I.R.C. § 6663(b) provides, "If the Secretary establishes that *any portion* of an under-payment is attributable to fraud, the entire under-payment shall be treated as attributable to fraud, except with respect to any portion of the under-payment *which the taxpayer establishes (by a preponderance of the evidence)* is not attributable to fraud."

Id. (emphasis added).

26. See *Wynn v. Commissioner*, 70 T.C.M. (CCH) 1646, 1653 (1995) (dismissing the case after finding that Service's allegations did not meet "clear and convincing" standard; one witness was absent minded and his equivocal testimony did not satisfy Service's burden of showing fraud by clear and convincing evidence).

27. See *Davis v. Commissioner*, 184 F.2d 86, 87 (10th Cir. 1950) (stating that "[f]raud implies bad faith, intentional wrong doing and a sinister motive" and that "[i]t is never imputed or presumed and the courts should not sustain findings of fraud upon circumstances which at most create only suspicion."), *rev'g*, 8 T.C.M. (CCH) 881 (1949) which found petitioner fraudulent.

28. See I.R.C. § 6663(b). However, in *Cipparone v. Commissioner*, 49 T.C.M. 1492, 1500 (1985), the Tax Court held that a minor conspirator who received an insignificant portion of the conspiracy income, and who was not knowledgeable or sophisticated, was not guilty of fraud. Apparently under some circumstances, a de minimis exception exists. This case is discussed at *infra* notes 148-54 and accompanying text.

29. See *Welch v. Helvering*, 290 U.S. 111, 114-15 (1933). "[The Commissioner's] ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong." *Id.* at 115. See also *Helvering v. Taylor*, 293 U.S. 507, 515 (1935); Tax Court Rule 142(a) ("The burden of proof shall be upon petitioner, except as otherwise provided by statute or determined by the Court. . .").

30. See I.R.C. § 6663(a) (imposing penalty of 75% of the additional tax on that portion of

In addition, statutory interest on both the underpayment and the penalty are imposed.³¹ Any appeal from the Tax Court goes to the United States Court of Appeals of the appropriate circuit.³²

Finally, a petitioner who has been found guilty of criminal tax fraud may be collaterally estopped from denying the elements of the crimes of which he was convicted. And, even if a prior criminal tax case has ended with a not guilty verdict, the Service can still proceed in the civil arena because the evidence might prove sufficient to be "clear and convincing," even if it was not "beyond a reasonable doubt."

Obviously, even though the civil fraud litigant does not run the risk of prison, he will likely face substantial financial exposure, especially if he cannot afford professional assistance in his contest with the Service.

II. HOW THE SERVICE PREVENTS THE TAXPAYER FROM DISCOVERING POSSIBLE ERRORS IN THE STATUTORY NOTICE: *GREENBERG'S EXPRESS AND SCAR*

The way in which the Service determines the asserted deficiency in the Statutory Notice is a fact that is usually obvious from the Statutory Notice, when the attached schedules set forth such things as unreported income from a Form W-2 or Form 1099, or denies certain specific deductions. There are no real policy decisions involved in a revenue agent's determinations of this type of Notice. The agent should go "by the book" (the Internal Revenue Manual) and other Service documents. The deficiencies asserted in the Statutory Notice, are derived from the agent's investigation and his determinations of facts. This type of Statutory Notice should be unquestioned as properly prepared because of its specificity, and because it shows that the agent preparing that document made a "determination" of the facts asserted.³³ The Tax Court properly refuses to look behind this type of Statutory Notice.³⁴ The court may find as a matter of fact that

taxable income attributable to fraud). Before the Omnibus Budget Reconciliation Act of 1989 (OMBRA), the Code imposed a 50% penalty and interest on the tax attributable to the entire underpayment, not just the portion of the underpayment attributable to fraud. *See* I.R.C. § 6653 (repealed 1989).

31. *See* I.R.C. § 6601(a) & (e)(2)(B) (imposing interest on statutory underpayment and penalty).

32. *See* I.R.C. § 7482(a) (giving exclusive jurisdiction to United States Courts of Appeals to review decisions of Tax Court).

33. *See Scar v. Commissioner*, 81 T.C. 855 (1983) (reviewed by the court), and its reversal on appeal 814 F.2d 1363 (9th Cir. 1987), for an analysis of the "determination" issue. *Scar* is discussed *infra* notes 75-104 and accompanying text.

34. *See* *Luhring v. Glotzbach*, 304 F.2d 560, 565 (4th Cir. 1962) (failing to comply with the Service's own internal procedural rules does not give due process grounds for enjoining jeopardy assessment); *Human Eng'g Inst. v. Commissioner*, 61 T.C. 61, 66 (1973) ("As far as the deficiency notice is concerned, it is . . . well established that the courts will generally not look behind such a notice to determine whether respondent's agents followed the established administrative procedures

some or all of the Service's assertions are not correct, but only after the petitioner has borne his burden of disproving the assertions in the Statutory Notice.³⁵

A. "Naked Assessment"

However, where the Statutory Notice involves a petitioner who is believed to have had unreported income, especially illegal income, the presumption of the accuracy of the Statutory Notice is more questionable.³⁶

Initially, the petitioner charged with receiving unreported income may challenge the Statutory Notice as asserting a "naked assessment." A naked assessment results when there is no minimal nexus between the taxpayer and the alleged source of that income. Any such minimal connection will negate a finding of a naked assessment. If the taxpayer asserts that there has been such a naked assessment, the court will put the burden on the Service to make that minimal showing.³⁷ This rare situation does require the Tax Court to "look behind" the Statutory Notice to see if such minimal connection exists. Quite surprisingly, the Supreme Court has held that the requisite minimal connection

in respect of investigation and according the petitioners a hearing."); *Pendola v. Commissioner*, 50 T.C. 509, 511-14 (1968) (District Director in Manhattan sent Statutory Notice to taxpayer residing in Brooklyn district during investigation covering both districts; notice valid).

35. See *Durkee v. Commissioner*, 162 F.2d 184, 187 (6th Cir. 1947) ("But where it is apparent from the record that the Commissioner's determination is arbitrary and excessive, the taxpayer is not required to establish the correct amount. . .") (remand to Tax Court for determination of tax owed, if any); *accord Marx v. Commissioner*, 179 F.2d 938, 942 (1st Cir. 1950) ("An arbitrary determination of deficiency by the Commissioner is not void and therefore a nullity. Such a determination is invalid, and if invalidity on that score can be established by the taxpayer, ground for redetermination by the Tax Court has been established."); *Human Eng'g Inst.*, 61 T.C. at 66 (dictum) (In a jeopardy assessment, the taxpayer has the burden of disproving determinations of Statutory Notice, and ordinarily the court will not look behind the Statutory Notice. If Notice was invalid, it is not void, but the burden shifts to the Service to prove the amount of the deficiency.).

36. See *Anastasato v. Commissioner*, 794 F.2d 884, 886-87 (3d Cir. 1986). The court explained that most cases utilizing the "no minimal connection" exception have involved illegal income. *Id.* See also *Weimerskirch v. Commissioner*, 596 F.2d 358 (9th Cir. 1979) (involving alleged income received from selling drugs; Service cannot rely on presumption alone where there is no substantive predicate evidence); *Gerardo v. Commissioner*, 552 F.2d 549 (3d Cir. 1977) (involving asserted income received from gambling; dismissed because no predicate evidence connected taxpayer with that source of income); *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969); *Dellacroce v. Commissioner*, 83 T.C. 269 (1984) (involving alleged income received from labor racketeering payoff) (no minimal contact for one taxable year, so within *Taylor*); *Llorente v. Commissioner*, 74 T.C. 260 (1980) (arbitrary because undercover agent never testified to taxpayer's participation and no other connection was made), *aff'd in part and rev'd in part*, 649 F.2d 152 (2d Cir. 1981).

37. See *Anastasato*, 794 F.2d at 887 (stating that Commissioner is entitled to presumption of correctness because he introduced evidence linking taxpayer to tax-generating activity).

may be obtained via an unconstitutional search, even if that evidence would be inadmissible at trial.³⁸

B. Greenberg's Express

After a showing that the proposed assessment was not "naked," the Service maintains that a taxpayer has no right to "look behind" the Statutory Notice to see how the amount of the deficiency was determined. *Greenberg's Express v. Commissioner*³⁹ seemed to state the proposition that the Tax Court will never look behind a Statutory Notice.

As a general rule, this Court will not look behind a deficiency notice to examine the evidence used or the propriety of respondent's motives or of the administrative policy or procedure involved in making his determinations. . . . The underlying rationale for the foregoing is the fact that a trial before the Tax Court is a proceeding de novo; our determination as to a petitioner's tax liability must be based on the merits of the case and not on any previous record developed at the administrative level.⁴⁰

The Service quite often refuses to furnish any information concerning exactly how any deficiency was determined based upon this reference to *Greenberg's Express*, even though it begins "As a general rule . . .," and specifically limits its applicability only to the Service's propriety, motives, policies or procedures.⁴¹

The Tax Court (and its predecessor, the Board of Tax Appeals) has a long history of refusing to look behind the Statutory Notice due to its perceived lack of jurisdiction,⁴² or because it did not have the duty or the right to decide whether there were any errors in the Statutory Notice.⁴³ Some commentators feel that the Tax Court simply wants to avoid looking into the inner workings of the Service.⁴⁴

The petitioners in *Greenberg's Express* argued that the Service discriminated against them by auditing them because they were related to notorious members

38. See *United States v. Janis*, 428 U.S. 433 (1976).

39. 62 T.C. 324 (1974).

40. *Id.* at 327.

41. *Id.*

42. See *Kerr v. Commissioner*, 5 B.T.A. 1073 (1927) (stating that Board has no jurisdiction to assess motives of Service). Of course, the Tax Court has jurisdiction to determine the true tax of the individual taxpayer, and an essential factor in that determination is the assertions of the deficiency in the Statutory Notice.

43. See *Levine Bros. Co. v. Commissioner*, 5 B.T.A. 689 (1926) (stating that Board of Tax Appeals will not examine deficiency because it had neither the right nor the duty to do so).

44. Mary Ferrari, "Was Blind, but Now I See" (Or What's Behind the Notice of Deficiency and Why Won't the Tax Court Look?), 55 ALB. L. REV. 407, 408 (1991) ("The Tax Court's refusal to look behind the notice of deficiency creates of the notice an impenetrable barrier that, in effect, shields the Service's administrative actions from scrutiny.").

of organized crime.⁴⁵ The petitioners asserted that the Service's Statutory Notices were arbitrary, unreasonable and capricious.⁴⁶ They moved the Court for an impoundment order to have the Service deliver "all documents . . . relating to the audit of petitioners' Federal income tax returns for 1966 through 1968. . . ."⁴⁷ This broad request for an order was sought to prevent the Service from "destroying or concealing" evidence that the petitioners' constitutional rights had been violated by the Service.⁴⁸ They further requested a review of those materials to prove their assertions of unconstitutional discrimination.⁴⁹

The petitioners in *Greenberg's Express* argued that if such discrimination could be proven, the Statutory Notice would be null and void, or alternatively, that the burden of proof, or at least the burden of going forward, would shift to the Service.⁵⁰

The court noted that there were other means of discovery under its regular discovery procedures and thus, the broad relief sought was improper.⁵¹ The court also noted that these discovery procedures were available for petitioners to obtain the documents, as long as they were sought for a proper purpose and were not privileged.⁵² However, because of *Greenberg's Express*, the Tax Court has consistently held, with few exceptions, that such information is not discoverable or admissible because it is either irrelevant, privileged, or prepared in anticipation of litigation.⁵³

It should be noted that in *Greenberg's Express*, the Tax Court did not say that it would *never* look behind the Statutory Notice.⁵⁴ On the contrary, the court

45. See *Greenberg's Express*, 62 T.C. at 325. Two petitioners were sons of Carlo Gambino, a notorious crime boss.

46. See *id.*

47. *Id.* See also TAX CT. R. PRACTICE & P. 103(a) (10) (governing impoundment orders).

48. *Greenberg's Express*, 62 T.C. at 326.

49. See *id.*

50. See *id.* (noting petitioner's request for shift in burden of proof to Service).

51. See *id.* at 326-27 (citing *United States v. Birrell*, 242 F. Supp. 191, 202-03 (S.D.N.Y. 1965); (in a bankruptcy proceeding the court stated that production of documents can be compelled through pretrial discovery, subpoenas duces tecum, or voluntarily by parties or witnesses to litigation)).

52. See *id.* (noting procedures available to petitioners). See generally TAX CT. R. PRACTICE & P. 72 (stating rule for production of documents); *P.T. & L. Constr. v. Commissioner*, 63 T.C. 404 (1974) (noting existence of procedures to obtain documents from Service).

53. See *Bennett v. Commissioner* 74 T.C.M. (CCH) 1144, 1149 (1997) (granting pretrial request for report of independent expert evaluator for the Service because the information was relevant and not within either the work product privilege or the attorney-client privilege); *Rosenfeld v. Commissioner*, 82 T.C. 105, 112 (1984) (finding information sought on discovery deemed irrelevant); *Branerton Corp. v. Commissioner*, 64 T.C. 191, 193 (1975) (denying petitioner's motion to compel production of documents stating that at least some information may be privileged, but that documents prepared in the ordinary course by nonlawyers is not in anticipation of litigation). *Id.* at 198.

54. See *Greenberg's Express*, 62 T.C. at 327.

said it would do so, particularly when there was substantial evidence of unconstitutional behavior on the part of the Service's employees in preparing the Statutory Notice.⁵⁵

However, even in such instances of unconstitutional behavior, the Statutory Notice would not be "null and void," as the petitioners argued.⁵⁶ Rather, the Statutory Notice would no longer carry the presumption of correctness that is normally conferred upon it.⁵⁷ In determining what standards would justify looking behind the Notice, the court referred to the tests developed dealing with prosecutorial discretion in a criminal case, and adopted similar rules.⁵⁸ The petitioners' allegations of unconstitutional selectivity did not satisfy this standard.⁵⁹

The issue raised by the petitioners in *Greenberg's Express* had to do with *why* the Service chose to audit a particular taxpayer's returns, and whether impermissible factors were used in that selection. The selection of which returns to examine is a policy determination and should not be subject to inquiry, except in the extremely rare case of unconstitutional selectivity.⁶⁰ In addition, the *Greenberg's Express* court did not compel disclosure of the information sought by petitioners because it had determined that such information would not affect the resolution of the case.⁶¹ Therefore, *Greenberg's Express* is of little pertinence to an inquiry into *how* (not *why*) a revenue agent may have committed errors in preparing his determination of the assertions set out in the Statutory Notice.

55. See *id.* at 328 (recognizing exception when there is unconstitutional conduct by Service).

56. See *id.* (refusing to declare deficiency notices null and void).

57. See TAX CT. R. PRACTICE & P. 142(a) (noting that shift of burden of proof is determined by court); see also *Human Eng'g Inst. v. Commissioner*, 61 T.C. 61, 66 (1973) ("[I]f, at a trial, it appears that the taxpayer has established that the [Service's] determination is without foundation, he will be relieved of his burden of proof as to the amount of tax which may be due and that burden will be shifted to respondent." (citing *Helvering v. Taylor*, 293 U.S. 507 (1935))).

58. See *Greenberg's Express*, 62 T.C. at 328-29 (assuming that similar standards should be applied for criminal discrimination and civil tax litigation). The court stated the criminal rule that before a complainant is entitled to relief, "it must appear that the law has been applied and administered by public authority with an evil eye and an unequal hand." *Id.* at 328 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

59. See *id.* at 329 ("[W]e do not believe that petitioners' allegations, even if true, would be violative of the applicable requirements of due process.").

60. See *Riland v. Commissioner*, 79 T.C. 185, 201 (1982) (holding that, absent substantial evidence of unconstitutional conduct by the Service, the court will not examine motives or procedure leading up to deficiency determination, even if Service's employees did not follow procedures set forth in Internal Revenue Manual); *Estate of David Smith v. Commissioner*, 57 T.C. 650, 656 (1972) (where unconstitutional conduct is not involved courts will not inquire into administrative policies employed by Service even if administrative procedures were not as prescribed in the Service's Internal Revenue Manual).

61. See *Greenberg's Express*, 62 T.C. at 327 (excessive coverage of request for materials is beyond any reasonable grounds).

What the court actually held in *Greenberg's Express* is that matters relating to the Service's *policy* decisions are not reviewable by the Tax Court (at least up to the limits of selective prosecution).⁶² The petitioners in that case cast a wide net, seeking any document even tangentially relevant to their case.⁶³ Their very broad discovery request did not directly deal with the assertion regarding the amount of the deficiency.⁶⁴ Thus, when limited to cases involving the Service's policy determinations, such as choosing which returns to audit, *Greenberg's Express* seems quite correct.

However, the Service often attempts, usually successfully, to extend the meaning of *Greenberg's Express* well beyond its holding by ignoring the factual context of the opinion, and emphasizing an overbroad interpretation.⁶⁵ The Service denies many taxpayer requests for information, including information related to *how* a deficiency was determined. However, the Tax Court's holding in *Greenberg's Express* was much narrower, and not even by analogy should it apply broadly to mere ministerial acts by any employees of the Service. Thus, as applied to such ministerial acts, the above excerpt from *Greenberg's Express* is dictum at best.⁶⁶

Applying *Greenberg's Express* as the Service argues would shield almost all information that might tend to show that an employee of the Service acted improperly or carelessly.⁶⁷ Except for the most blatant and erroneous situations, such as an obvious and substantial mathematical error on the face of the Statutory Notice, or a Notice which clearly does not refer to the petitioner's income or deductions, a petitioner must know how the specific dollar assertions in the Statutory Notice were computed in order to begin to bear his burden of refuting the assertions. In answering such request for information, the Tax Court often ignores the difference between inquiries as to "how" something was done (which

62. See *id.* (holding court would not look behind deficiency notice to examine administrative policy used in making its determinations).

63. See *id.* at 325-26 (stating that petitioners sought access to all documents relating to audit of petitioner's federal income tax returns for 1966 through 1968 and any documents relating to investigation of petitioners by Department of Justice, Internal Revenue Service or Federal Strike Force Against Organized Crime).

64. See *id.* (noting that taxable year in question is 1968 and information requested involves other years as well as other investigations not involving tax matters).

65. See *Pasternak v. Commissioner*, 990 F.2d 893, 898 (6th Cir. 1993) (stating that so long as valid summonses were issued, a trial court will not examine evidence obtained via those summonses); *Riland*, 79 T.C. at 201 (1982) (court's unwillingness to examine procedures used by Service leading to a determination of deficiency). For a discussion of the Service's argument in support of the proposition that the Tax Court should never look behind the Statutory Notice, see *supra* notes 39-64 and accompanying text. See also *infra* notes 66-74 and accompanying text.

66. See *Hudspeth v. Commissioner*, 914 F.2d 1207, 1214 (9th Cir. 1990) (reversing and remanding to Tax Court, which then held Commissioner's motives in determining deficiency irrelevant; Ninth Circuit distinguished *Greenberg's Express* saying instant case challenged accuracy of Statutory Notice, not the Service's motives for that Notice; therefore inquiry allowed).

67. See *Ferrari*, *supra* note 44.

should be proper) and inquiries as to "why" something was done (which are improper).⁶⁸

In addition, as the *Greenberg's Express* court noted, the full range of discovery under the Tax Court's rules should allow the taxpayer access to all relevant information the Service possesses if it would be admissible at trial and is not otherwise privileged.⁶⁹ For example, a petitioner should have a right to obtain from the Service all relevant, non-privileged information, such as reports of special agents and testimony of third party witnesses.⁷⁰ Thus, there is a clear conflict between the discovery rules and the Service's view of *Greenberg's Express*.

When a petitioner seeks to know how the Service arrived at a "presumed correct" conclusion, he is usually deterred by the Service's overly broad interpretation of *Greenberg's Express*.⁷¹ Furthermore, the Tax Court generally acquiesces and does not require production of the revenue agent's work papers or testimony from the agent.⁷² Yet, such productions of work papers and testimony will not harm the Service if the Statutory Notice had been properly prepared.⁷³ The Service's unwillingness to supply this information appears to

68. See *Abatti v. Commissioner*, 644 F.2d 1385, 1389 (9th Cir. 1981) (stating that Notice is sufficient to confer jurisdiction on the Tax Court even if Service merely informs taxpayer of an amount of deficiency and does not mention specific ground for deficiency); *Barnes v. Commissioner*, 408 F.2d, 65, 68 (7th Cir. 1969) (stating that Service's Notice is not invalidated if it contains no particulars; Tax Court has jurisdiction); see also *Ferrari*, *supra* note 44, at 407 (stating that Tax Court has imposed minimal requirements on Service in refusing to look behind notice to method of determining deficiency).

69. *Greenberg's Express*, 62 T.C. at 327; see also *P.T. & L. Constr. Co. v. Commissioner*, 63 T.C. 404, 408 (1974) (stating that if executive privilege does not apply, then special agent's report, appellate conferee's report, and the transcript of interrogation of a third party are all subject to discovery under Tax Court rules). For a discussion of the Service's view of privilege, see *infra* notes 105-12 and accompanying text.

70. See *Branerton Corp. v. Commissioner*, 64 T.C. 191, 202 (1975) (holding taxpayer is entitled to inspect copy of Service's audit papers absent an applicable privilege); *P.T. & L. Constr.*, 63 T.C. at 411-13 (holding that petitioners were entitled to portions of special agent's report not covered by executive privilege and that third party statement is subject to discovery).

71. See *Anastasato v. Commissioner*, 794 F.2d 884, 886 (3d Cir. 1986) (stating that government's deficiency assessment is generally afforded presumption of correctness, unless no predicate evidence links petitioner to unreported income from illegal sources).

72. See *Abatti*, 644 F.2d at 1389 (Statutory Notice that does not contain any reasons for deficiencies is valid to confer Tax Court jurisdiction).

73. In *Ryan v. Commissioner*, 75 T.C.M. 1778 (1998), the Service did provide petitioners with four pages of hand written notes and calculations of the revenue agent who prepared the amounts of the deficiencies on each petitioner's Statutory Notice. When petitioner Giongo called the revenue agent to testify about apparent inconsistencies in those notes, the Service objected under *Greenberg's Express*. The trial judge overruled that objection, and the agent testified with some apparent confusion and inconsistencies. See *Ryan Transcript*, at 2288-2342 (on file with the *Indiana Law Review*) (hereinafter *Transcript*).

stem from its adversarial desire as a litigant to give as little information as possible to an adversary, in spite of the broad discovery granted under the Tax Court's rules.⁷⁴ This position also helps to sustain the public's perception that the Service is more interested in winning cases than in determining a taxpayer's true tax liability.

B. Scar v. Commissioner

An extreme example of the Tax Court's persistent refusal to look behind a Statutory Notice is *Scar v. Commissioner*.⁷⁵ The Service mailed what it purported to be a Statutory Notice to the Scars on June 14, 1982, asserting a deficiency of \$96,600 due to the disallowance of deductions totaling \$138,000 attributable to the "Nevada Mining Project."⁷⁶ The "[t]otal corrected income tax liability," \$96,600, was calculated at seventy percent (the maximum marginal rate) of the disallowed \$138,000.⁷⁷ An attached document with the title "Nevada Mining Project, Explanation of Adjustments" stated:

In order to protect the government's interest and since your original income tax return is unavailable at this time, the income tax is being assessed at the maximum tax rate of 70%. The tax assessment will be corrected when we receive the original return or when you send a copy of the return to us.⁷⁸

In addition, another attached document, also titled "Nevada Mining Project, Explanation of Adjustments" stated:

It is determined that the alleged losses claimed by you in your income tax return for the taxable year(s) 7812 with respect to an alleged partnership known as NEVADA MINING PROJECT are not allowable because you have not established that the transactions in which the partnership was involved or in which you were involved with respect to the partnership were bona fide arm's length transactions at fair market value, that such transactions were entered into for profit, or that such transactions had any economic substance other than the avoidance of taxes.⁷⁹

In addition, this second document stated, in the alternative, that no ordinary and necessary expenses had been incurred, and that no adjusted basis had been

74. See Loren D. Prescott, Jr., *Challenging the Adversarial Approach to Taxpayer Representation*, 30 LOY. L.A. L. REV. 693, 699 (1997) (stating that antagonistic nature of system encourages parties to present only that information which supports their respective positions).

75. 81 T.C. 855 (1983), *rev'd*, 814 F.2d 1363 (9th Cir. 1987). For further discussion of the Ninth Circuit's discussion, see *infra* notes 94-104 and accompanying text.

76. *Scar*, 81 T.C. at 857.

77. *Id.*

78. *Id.*

79. *Id.*

shown for the investment (which would limit the loss deduction), and that any loss would be limited by Section 465 of the Code.⁸⁰

The Scars filed a petition with the Tax Court in which they alleged that they had never had any interest in Nevada Mining, and therefore they had not claimed any deductions related to Nevada Mining.⁸¹ In its answer, the Service simply denied the allegations in the petition.⁸²

Petitioners moved to dismiss for lack of jurisdiction, alternatively arguing: (1) no "determination" of a deficiency was made by the purported Statutory Notice; (2) that if a "determination" had been made, no notice of that determination had been sent to the petitioners; and (3) the purported Notice improperly advised of an assessment concurrently with the Notice.⁸³ Any of these issues would be fatal to the validity of the purported Notice.⁸⁴

In response to petitioners' motion to dismiss, the Service conceded that the petitioners never had any interest in any mining partnership or activity.⁸⁵ Then the petitioners moved for summary judgment based on the Service's concession.⁸⁶ The Service then moved for leave to amend its answer, to state the correct (and much smaller deficiency) due to a disallowance of deductions attributable to a completely different tax shelter. It admitted that the error was made by its agent who erroneously entered the wrong tax shelter number into the Service's computer.⁸⁷

The Tax Court held that the Statutory Notice sent to the Scars conferred jurisdiction, even though it purported to deny a deduction not claimed by the taxpayers and even though the Service had stated in its Notice that it did not base its determination of the deficiency on the taxpayers' return (since it did not have that return).⁸⁸ The court held that because no particular form is required for a Statutory Notice, as long as (1) the taxpayer's name, (2) Social Security number, (3) the taxable year or years involved and (4) an amount of a deficiency are stated on the document, it qualifies as a valid Statutory Notice.⁸⁹

The court also permitted the Service to amend its answer.⁹⁰ This amended answer was filed after the statute of limitations for the year in issue had expired.⁹¹ In effect, the court's opinion permits the Service to avoid the statute

80. *See id.* at 857-58.

81. *See id.* at 858.

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.* at 858-59.

87. *See id.* at 859.

88. *See id.* at 858-62.

89. *See id.* at 860.

90. *See id.* at 863-64.

91. The statute of limitations expired on September 3, 1982 (taxpayers had received an extension of time to file); Respondent's motion for leave to amend was filed April 5, 1983. *See id.* at 858.

of limitations by sending a generic letter with no details, informing the taxpayer that the Service intends to assess taxes against him, and assuming that the court will permit the Service to amend its answer to conform to the correct facts, as it did in *Scar*.⁹²

The Tax Court held that I.R.C. § 6212 is purely procedural and has no substantive effect.⁹³ This position does not require the court to look behind the Notice of Deficiency to see if the deficiency asserted had been properly “determined” by the Service.

However, the Ninth Circuit reversed.⁹⁴ While the court agreed that a Statutory Notice need not be in any particular form,⁹⁵ and need not explain how the determinations were made, the court continued: “The notice must, however, ‘meet certain substantial requirements’⁹⁶ ‘The notice must at a minimum indicate that the IRS has determined the amount of the deficiency.’⁹⁷

The court went on to state that Section 6212(a) “‘authorizes’ the sending of a deficiency notice ‘[i]f the Secretary *determines* that there is a deficiency.’⁹⁸

Quoting Judge Goff’s dissent below, the appellate court held “[e]ven a cursory review of this provision [section 6212 (a)] discloses that Congress did not grant the Secretary unlimited and unfettered authority to issue notices of deficiency.”⁹⁹

In addition, the circuit court cited with approval a very early opinion of the Board of Tax Appeals,¹⁰⁰ wherein the Board “construed the meaning of the term ‘determine’ as applied to deficiency determinations. By its very definition and etymology the word ‘determination’ irresistibly connotes consideration, resolution, conclusion, and judgment.”¹⁰¹

Since the Service cited the wrong shelter and its attributes and did not have the tax return in question, there could not have been the requisite “determination.” The “‘determination’ requirement of section 6212(a) has substantive content.”¹⁰² This appellate opinion clearly linked the requirements

92. In his dissenting opinion of the Tax Court, Judge Sterrett satirically drafted a generic Statutory Notice illustrating how the Service could send a nonspecific document that could serve as a valid Statutory Notice for any taxpayer under the majority view. *See id.* at 869.

93. *See id.* at 869 (Sterrett, J., dissenting).

94. *See Scar*, 814 F.2d 1363 (9th Cir. 1987). Judge Hall dissented. *Id.* at 1371.

95. *See id.* at 1367.

96. *Id.* (citing *Abrams v. Commissioner*, 787 F.2d 939, 941 (4th Cir. 1986), *cert. denied*, *sub nom.* *Eggleston v. Commissioner*, 479 U.S. 882 (1986)).

97. *Id.* (citing *Benzvi v. Commissioner*, 787 F.2d 1541, 1542 (11th Cir.), *cert. denied*, 479 U.S. 273 (1986)).

98. *Id.* at 1368.

99. *Id.* (citing *Scar*, 81 T.C. 855, 872 (1983)).

100. *Terminal Wine Co v. Commissioner*, 1 B.T.A. 697, 701 (1925).

101. *Scar*, 814 F.2d at 1368.

102. *See id.* at 1369. “To hold otherwise, would read the determination requirement out of section 6212(a).” *Id.* at 1370.

of a Statutory Notice to the administrative "determination" of a deficiency.

In dissent, Judge Hall, a former Tax Court judge, stated that "the majority [opinion] undermines the jurisdiction of the Tax Court by constructing a superfluous yet substantial hurdle to its jurisdiction."¹⁰³

The view of the Ninth Circuit in *Scar* seems correct. There really should be a "determination" as prescribed in the statute and the Service's published internal procedures, and then those determinations of fact and law should be spelled out in the Notice. This is necessary to permit fairness in litigation. The Statutory Notice not only confers jurisdiction on the Tax Court, in practical effect it is really also the initial pleading in the case. In spite of this, the Tax Court has limited the Ninth Circuit's *Scar* result to the peculiar facts of *Scar*, where the amount of the deficiency asserted on the face of the Notice was not that of the taxpayer.¹⁰⁴ Indeed, apparently the Ninth Circuit has also limited *Scar* to its facts.¹⁰⁵

There seems to be no valid policy reason to deny access to the details of the calculations in the Statutory Notice, through discovery or an agent's testimony. The resulting perception is that such information is denied to protect the reputation of the Service or its employees. While an employee of the Service may sometimes be careless, such carelessness is probably rare. But no one knows exactly how rare, because of the Tax Court's refusal to look at any defects in the administrative process concerning how—as opposed to why—the assertions in the Notice were determined.

If the Service is "stonewalling" because it is hiding something, or at least seeking unfair advantage in litigation, this should be changed. Showing the truth of how the deficiency was prepared would defuse many of these suspicions. And, it would help assure that the agent and his superiors would be more careful in preparing their calculations.¹⁰⁶ At the very least, the procedures spelled out in the Internal Revenue Service Manual should be made mandatory, rather than directory.¹⁰⁷ This could be enforced by having a procedurally deficient (without explanations) Notice qualify as a "ticket to the Tax Court," but deny the presumption of correctness to the assertions made. This should present no problem if the agents are as careful as they should be in calculating six digit deficiencies. The taxpayer should be afforded due process of the law by the Service and the Tax Court.

103. *Id.* at 1371.

104. *See Campbell v. Commissioner*, 90 T.C. 110, 112-113 (1988) (holding that only when it is apparent on the face of the Notice that it was not based on a determination, as on the peculiar facts in *Scar*, is the purported Notice invalid). *Campbell* distinguished *Scar*, stating that it would not go behind the Notice where the first page of the Notice correctly identified the taxpayer and the stated the correct amount of the taxpayer's deficiency asserted, even though the remaining pages of schedules had no connection with the taxpayer. *See id.* at 112-113.

105. *See Clapp v. Commissioner*, 875 F.2d 1396, 1402 (9th Cir. 1989).

106. *See Ferrari, supra* note 44, at 453-55.

107. *See id.* This could be accomplished by having the Treasury promulgate them as regulations, or by act of Congress through another Taxpayer Bill of Rights.

The Service may feel it is unfair to have an erroneous tax shelter number entered by an employee (as in *Scar*) deprive the government of needed revenue. This situation, however, is quite analogous to an agent mailing the Notice to the wrong "last known address,"¹⁰⁸ possibly barring any assessment against the taxpayer if the statute of limitations runs before a correctly addressed Notice can be sent. There should be some consequence when the Service's employees do not follow the rules.

In *Ryan*, the court permitted the taxpayers to call and examine the revenue agent who prepared the report upon which the Statutory Notice was based.¹⁰⁹ The trial judge wanted to hear his testimony because "I think the statutory notice needs all the explanation it can get."¹¹⁰ Respondent had supplied some of the agent's work papers to petitioners' counsels. A student from the Villanova Tax Clinic¹¹¹ examined the agent. It was apparent that there were questions that he could not answer clearly.¹¹² He did describe how he and another agent went about determining the amounts of unreported income attributable to each of the five petitioners, by using the transcript of the criminal trial.¹¹³ He was somewhat confused about certain inconsistencies in the work papers. For example, on one search the petitioners were alleged to have stolen cash, diamonds and casino chips totaling \$93,300.¹¹⁴ The sum of the value of the cash, \$24,000,¹¹⁵ the value of the diamonds, \$13,000,¹¹⁶ and the value of the chips, \$65,000¹¹⁷ ascribed to the petitioners on the agent's work sheets, does not equal the \$93,300 total on the same work sheets. In addition, on one page of the work papers the total for three searches for 1983 appeared in one place as \$121,500 and at another place on the same page of the agent's work papers the figure was \$121,600 (the latter figure

108. I.R.C. § 6612(b)(1) (1999).

109. See Transcript, *supra* note 73, at 2285-87.

110. *Id.* at 2319.

111. Jode Shaw was the student. She was a C.P.A.

112. To be fair to the agent, he probably expected that he would not be required to testify under *Greenberg's Express*, or due to privilege.

113. The agent was unaware that there had been two trials because the first trial had ended with a hung jury. See Transcript, *supra* note 73, at 2301. He described how he and another agent went about determining the amount of unreported income they felt each taxpayer had received. The other agent had read the transcript of the criminal trial and given him a summary based upon the conviction pages of the transcript. See *id.* at 2291-92. In addition to these summaries, he also referred to the indictments which led to the convictions, which differed in some particulars from the transcript, see *id.* at 2304, 2329, and he also read the special agent's report. See *id.* at 2234.

114. This was the Hitchens search on December 30, 1982. *Id.* at 2295-2301. The dollar amount is stated. See *id.* at 2298.

115. See *id.* at 2297.

116. See *id.* There was a further discrepancy in the value of the 13 diamonds stolen. In one place they were valued at \$100 each, and at another place they were valued at \$1000 each. See *id.* at 2299-2300. The agent used the higher value in calculating the deficiency.

117. See *id.* at 2297. There was also some confusion as to whether a sum of \$14,000 in chips was included in the \$65,000 or was an additional amount. See *id.* at 2297-98.

was used on the Statutory Notices).¹¹⁸

None of these errors represented a significant percentage of the total dollar figures asserted, and the deciding judge¹¹⁹ presumably regarded these as harmless error. However, it must be remembered that the assertions in the Notice are presumed to be correct.¹²⁰ In the usual civil fraud case, where the court would not permit petitioners to "look behind" the Notice, these errors could not be detected. If in fact the Tax Court normally required the revenue agent's reports to be made available to petitioners and required the agent to testify as to how he or she formulated those reports, a petitioner could be sure the process (if not the dollar amounts computed) was correct. It should not require much extra time for revenue agents to be more careful, and the positives benefits of full disclosure of the process to the Service should more than offset any negatives. There seems to be no good reason for the no disclosure policy aside from the possibility of embarrassment. As long as the Service stonewalls, there will always be suspicion that the Service is intent on hiding its errors. Again, recall that all that is being sought is *how* the Service did or did not conform to its published procedures; it does not seek information on *why* the Service acted as it did.

III. HOW THE SERVICE PREVENTS THE TAXPAYER FROM DISCOVERING POSSIBLE ERRORS IN THE STATUTORY NOTICE: PRIVILEGE

In addition to the *Greenberg's Express* argument, the Service consistently argues that all documents supporting its computations of a deficiency are prepared in anticipation of litigation, and therefore are not discoverable.¹²¹ But is a Revenue Agent's Report ("RAR"), compiled after an audit, prepared in

118. See *id.* at 2312-14. The agent could offer no explanation for the difference. See *id.*

119. Remember that the trial judge had died before briefs were submitted, and the deciding judge did not have the benefit of watching the agent on the witness stand.

120. See *supra* note 29 and accompanying text.

121. See generally FED. R. CIV. P. 26 (permitting discovery for non-privileged documents). Subsection (a)(1)(B) provides that "a party shall . . . provide to other parties . . . a copy of, or a description by category and location of, all documents . . . in the possession, custody, or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings." FED. R. CIV. P. 26(a)(1)(B). In addition, Rule 26 permits discovery for all documents not privileged. See FED. R. CIV. P. 26(b)(1) ("Unless otherwise limited, . . . [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.").

Federal Rule of Evidence 501 states, "[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. The attorney-client privilege and work product protection for documents are recognized as the oldest of the privileges for confidential communications known to the common law. See *United States v. Zolin*, 491 U.S. 554, 562 (1989) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). In the Tax Court, the Service will often refuse to produce any documents they feel were produced in anticipation of litigation. See *infra* notes 120-25 and accompanying text (discussing the contrary view of the District Court in *Peterson v. United States*, 52 F.R.D. 317 (S.D. Ill. 1971)).

“anticipation of litigation”? While an RAR may actually be used to show the amount of the deficiency asserted in the Statutory Notice, that is not the primary function of the RAR.¹²² In effect, the Service is asserting that *everything* its employees do at *any time* is potentially part of some future litigation and, thus, not discoverable. This position reinforces the Service’s position in *Greenberg’s Express*, sharply decreasing the likelihood that a petitioner will find a basis for any error in a Statutory Notice.

In *Peterson v. United States*,¹²³ the Service asserted that all of its reports and documents were prepared in anticipation of litigation and were therefore undiscoverable.¹²⁴ The District Court concluded, however, that all reports and documents are *not* prepared in anticipation of litigation.¹²⁵ The court held that documents that are privileged as prepared in anticipation of litigation do *not* include the following:

- (1) documents that are routinely prepared before a lawsuit is filed;
- (2) documents that are not prepared at the direction of an attorney involved in preparing a case if litigation develops;
- (3) documents that are not designed to be adversarial, but impartial between the taxpayer and the Service;
- (4) documents that do not pertain to the Service’s theory of a trial of that case; and
- (5) reports resulting from evidence submitted by the taxpayer and the Service.¹²⁶

122. See *Block-Southland Sportswear Co. v. United States*, No. 1563, 1972 WL 455, at *1 (E.D.N.C. Nov. 24, 1972) (explaining primary purpose of RAR). “The purpose of such letter and report is to inform the taxpayer of the results of an income tax audit for a particular year and to extend to him an opportunity to request a conference for a further discussion of a proposed adjustment in his tax liability.” *Id.*

123. 52 F.R.D. 317 (S.D. Ill. 1971).

124. See *id.* at 320 (expressing Service’s conclusory view that documents are not discoverable).

125. See *id.* at 320-22 (holding documents discoverable because they were not prepared in anticipation of litigation). It must be noted that before a taxpayer can bring a refund suit in the District Court (or the Court of Federal Claims), he must pay the entire deficiency. See *supra* note 22. In most instances of fraud, the asserted deficiencies—especially if a “protective position,” see *infra* Part VII, is asserted by the Service—are so large that prepayment is not an option. Therefore, taxpayers must litigate in the Tax Court, even if there is a more favorable discovery decision in another forum.

126. *Peterson*, 52 F.R.D. at 320-21 (identifying documents that were not privileged). In *Peterson* the Service argued that disclosure of documents prepared prior to litigation would inhibit free and open discussion among officials and, thus, violated public policy. See *id.* at 321 (discussing Service’s public policy assertion based on prior legal precedent). The court noted that those officials had submitted affidavits stating that opinions at the various levels of the Service were impartial expositions of the facts and the law, and that revealing those opinions should not embarrass the government. See *id.*

No further commentary is needed. The Tax Court should adopt this rational, sensible approach. There seems to be no obvious downside to the District Court's position, except for the Service's loss of an unfair litigation advantage. It is particularly unfortunate that the Tax Court does not adhere to this view, because almost all civil fraud cases must be in fact be brought in the Tax Court.¹²⁷

IV. THE TAX COURT'S "DE NOVO" TRIAL DOES NOT CURE ERRONEOUS STATUTORY NOTICES

The Tax Court has consistently held that, because its trial is *de novo*, it will weigh any errors in a Statutory Notice.¹²⁸ Of course, this does not solve the problem for a petitioner who is the possible victim of the Service's "stonewalling" under *Greenberg's Express* and the assertion of privilege. The *de novo* trial really does not address these problems because the Service still benefits from the "presumptive correctness" of its (possibly erroneous) Statutory Notice,¹²⁹ and the Tax Court usually does not permit inquiry into the Service's methods of determining a deficiency. And, even where the Statutory Notice is invalid on its face, as in *Scar*, the Tax Court will not look behind the Notice.¹³⁰

Therefore, in a most important sense, the Tax Court trial is not truly *de novo*. The court seems to focus on its jurisdiction as the sole function of the Statutory Notice.¹³¹ However, in addition to its procedural jurisdictional effect, the Notice is a substantive document quite analogous to the initial pleading in any other type of case, except that its allegations are presumed to be correct. These presumptively correct assertions become fact determinations unless they are successfully rebutted by the petitioner.¹³² The problems created by this substantive effect of the Notice are especially difficult for taxpayers who are marginal members of a conspiracy and must disprove a sum likely to be greatly in excess of anything they received because of the "protective position" even if

127. Keep in mind that few civil fraud cases can be brought anywhere but the Tax Court. See *supra* note 22.

128. *Riland v. Commissioner*, 79 T.C. 185, 201 (1982) (stating that a trial before the Tax Court is proceeding *de novo*, citing *Greenberg's Express v. Commissioner*, 62 T.C. 324, 328 (1974)) (fact that Service personnel did not follow internal procedures as stated in Internal Revenue Manual is not a denial of due process, citing *United States v. Canceres*, 440 U.S. 741 (1979)).

129. See *Anastasato v. Commissioner*, 794 F.2d 884, 886 (3d Cir. 1986) (stating government's deficiency assessment is generally afforded presumption of correctness once Service has shown evidence linking petitioner to income source). But see *Hudspeth v. Commissioner*, 914 F.2d 1207, 1214 (9th Cir. 1990) (reversing Tax Court which had held Service's motives in determining deficiency are irrelevant; distinguishing *Greenberg's Express* by noting that the instant case challenges accuracy of Statutory Notice, not the Service's motives for that Notice).

130. "The fact that it subsequently develops even prior to trial that there was no deficiency on the basis of the grounds set forth in the deficiency notice is irrelevant." *Scar v. Commissioner*, 81 T.C. 855, 861 (1983).

131. See, e.g., 814 F.2d at 1371-72 (Hall, J., dissenting).

132. See *supra* note 29 and accompanying text.

they have no knowledge of the finances of the conspiracy.¹³³

Clearly, application of *Greenberg's Express* must be limited to cases involving facts similar to those in that case,¹³⁴ and the assertion of privilege must also be limited. The court's notion that its de novo trial will cure any failures or errors in the administrative process is hard to justify. It seems that the underlying basis for the Service's refusal to produce documents and testimony is simply adversarial advantage. Only the Tax Court can remedy this secrecy by permitting discovery of these documents. However, the Tax Court simply does not wish to delve into the internal workings of the Service.¹³⁵

The Tax Court's position is that the primary function of the Statutory Notice is to determine whether that Notice is adequate to confer jurisdiction on the court, rather than to see if the taxpayer has received due process under the Service's own stated administrative procedures.¹³⁶

A de novo trial of a civil fraud case cannot bring any failures or errors made by the Service to light because even simple computational errors could not be discovered under the Service's extreme view of *Greenberg's Express*. In short, only issues of *policy* within the Service should be subject to this evidentiary exclusion. Similarly, the judiciary should view the Service's assertions of privilege skeptically, as the District Court did in *Peterson*.¹³⁷

V. *HELVERING V. TAYLOR*, ERRONEOUS NOTICES, AND THE EVIDENTIARY PROBLEMS POSED BY *GREENBERG'S EXPRESS* AND PRIVILEGE

Helvering v. Taylor,¹³⁸ shifted the burden from the taxpayer to the Service to show the amount of tax due where the asserted deficiency was "arbitrary and excessive."¹³⁹ *Taylor* has never been overruled. It is rarely applied by the lower courts however,¹⁴⁰ due in large part to the Service's reading of *Greenberg's Express* and privileges as shields against discovery. Unless there is obvious evidence of substantial errors within the Service, the courts' history of shielding non-policy, internal decisions effectively prevents many taxpayers from knowing how the amount of the asserted deficiency was determined and, therefore, from knowing if the Service committed any errors. The result of the Service's refusal to disclose how deficiencies were determined makes a petitioner's burden of disproof even more onerous than the already difficult burden he bears to disprove

133. See *infra* Part VII.

134. For a discussion of *Greenberg's Express*, see *supra* notes 39-74 and accompanying text.

135. See Ferrari, *supra* note 44.

136. See *id.* at 423-28.

137. See *supra* notes 123-29 and accompanying text.

138. 293 U.S. 507 (1935).

139. *Id.* at 515.

140. See *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991) (finding taxpayer had proven assessment to be arbitrary and without foundation); *Estate of Todisco v. Commissioner*, 757 F.2d 1, 5 (1st Cir. 1985) (holding that Service's determination of profit percentage was arbitrary and excessive and therefore unsustainable).

the assertions made in the Statutory Notice.¹⁴¹

Where the courts have applied *Taylor*, some cases say that it results in a shift of the burden of going forward to the Service, but the taxpayer still retains the ultimate burden of persuasion.¹⁴² Other courts have held that the burden of persuasion also shifts to the Service.¹⁴³ Either way, if the taxpayer has no information regarding how the asserted deficiency was determined, he could not begin to show whether the amounts shown in the Statutory Notice are in fact "arbitrary and excessive," or even simply erroneous.¹⁴⁴ Under the Service's view of *Greenberg's Express*, a taxpayer cannot even contest an erroneous transposition of figures, a computational error, or sloppiness.¹⁴⁵ Remember that these possibly erroneous assertions are presumed correct.¹⁴⁶

The Service should not oppose disclosure of such errors, however, because the effect of such disclosures will foster confidence in the fairness of the process. In addition, it would show that the Service cares about fairness, even if the agents must take more time and be more careful in preparing Statutory Notices. There is no obvious reason, other than adversarial advantage, why the Service should oppose more carefully prepared documents and the testimony of the agent who

141. See *Vessio v. Commissioner*, 59 T.C.M. (CCH) 495 (1990) (discussing presumption of correctness attaches to Statutory Notice and noting that in case of criminal loansharking, Service showed connection of hoard of cash to taxpayer's activity); *Callan v. Commissioner*, 42 T.C.M. (CCH) 796 (1981) (noting that presumption of correctness attaches to statutory notice with respect to disallowed deductions).

142. See *Higginbotham v. United States*, 556 F.2d 1173, 1176 (4th Cir. 1977) (holding that burden of persuasion remains with taxpayer once taxpayer has introduced evidence that assessment is arbitrary and excessive); *United States v. Rexach*, 482 F.2d 10, 16 (1st Cir. 1973) (same, based on regularity of taxpayer having records).

143. See *Keogh v. Commissioner*, 713 F.2d 496, 501 (9th Cir. 1983) (dictum) (burden of persuasion shifts to government when taxpayer overcomes presumption of correctness by showing naked assessment, because jeopardy assessment cannot be enjoined); *United States v. Stonehill*, 702 F.2d 1288, 1294 (9th Cir. 1983) (dictum).

144. See *Keogh*, 713 F.2d at 500 (stating that petitioners were unable to rebut presumption of correctness because they did not present evidence showing that Service's assessment was incorrect).

145. See *Pasternak v. Commissioner*, 990 F.2d 893, 898 (6th Cir. 1993) (stating that court will not look behind Statutory Notice based on evidence obtained via summonses as long as the summonses were validly issued, citing *Greenberg's Express*); *Riland v. Commissioner*, 79 T.C. 185, 201 (1982) (stating court's unwillingness to examine procedures used by Service to determine deficiency, citing *Greenberg's Express*).

Even if the Service in fact furnishes a copy of the revenue agent's rough worksheets used to calculate the amount of the fraudulent deficiencies to the petitioner, as occurred in *Ryan*, the revenue agent, if called to testify at trial, can still invoke *Greenberg's Express* to preclude his testimony concerning those work papers. In *Ryan* the court overruled the Service's objection under *Greenberg's Express*. Transcript, *supra* note 73, at 2285-87.

146. For a discussion of the presumption of correctness, see *supra* note 29 and accompanying text.

prepared the Statutory Notice.

Given the recently publicized congressional hearings dealing with abuses committed by the Service, the openness suggested herein might help reduce public suspicion of the Service.¹⁴⁷

VI. COMPLICATIONS IN A MULTI-PARTY SITUATION

When the petitioner's fraudulent activity is part of a RICO¹⁴⁸ or other conspiracy charge, his burden of disproof compounds dramatically because he must not only bear part of the burden of disproving the gross amount of the income asserted for the entire conspiracy, but he must also bear the burden of disproving the Service's assertions of his own portion of that total income.¹⁴⁹ This approach may be reasonable if the taxpayer knows, or should know, the inner workings of the conspiracy. However, for a marginal conspirator who does not know these details, placing the burden of proof on that petitioner seems quite unreasonable. Indeed, a conspirator on the fringe of the conspiracy may in fact know nothing about the conspiracy or its profits aside from what the primary conspirators tell him. Moreover, if a conspirator is deemed a member of the conspiracy solely by virtue of participating in a cover up, he may not have received a distribution of any monetary proceeds.

In *Cipparone v. Commissioner*,¹⁵⁰ for example, a conspirator who had been convicted of a criminal act under RICO and of engaging in a bribery conspiracy under state law, which did not require his receipt of money, was found not to have committed fraud and not to have received substantial money from the conspiracy.¹⁵¹

147. See *Hudspeth v. Commissioner*, 914 F.2d 1207, 1214 (9th Cir. 1990) (reversing and remanding to Tax Court which held Commissioner's motives in determining deficiency irrelevant, and distinguishing *Greenberg's Express* saying instant case challenges accuracy of Statutory Notice, not the Service's motives for that Notice). For a discussion of legitimate exclusions of evidence under *Greenberg's Express*, see *supra* notes 60-67 and accompanying text.

148. Organized Crime Control Act Title IX, 18 U.S.C. §§ 1961-68 (1994).

149. Once fraud has been shown by the Service, each petitioner must bear the burden of disproving the amount of the income asserted against him in the Notice. See *supra* note 29. Because of the cumulative and redundant assertions of virtually the entire income of the conspiracy income against each taxpayer under the protective position, such disproof is difficult. Such disproof is especially difficult for a minor conspirator, because the relatively small amounts of illegal income he received is dwarfed by the total income of the conspiracy. See *infra* note 175 for the large dollar figures of unreported income attributed to Giongo in the Statutory Notice in *Ryan*, and the dramatically lesser amount he was determined to have received by the court.

150. 49 T.C.M. (CCH) 1492 (1985).

151. *Id.* at 1500 (finding insufficient evidence of fraud). "We cannot find petitioner's failure to report his share of kickback income, of which he may never have received more than an insubstantial portion, to be clear and convincing evidence of fraud." *Id.* The court posited that because the petitioner was not at all familiar with tax laws, there was no way he should have known of the requirement to file when he believed no income was received. See *id.* Due to his lack of

Cipparone, the Court Administrator of the Philadelphia Traffic Court, was involved in an illegal kickback scheme with two others.¹⁵² The other two conspirators personally collected the traffic court fines, divided the money between themselves, and allegedly gave some small sums to the petitioner.¹⁵³ The Tax Court found that the petitioner received substantially less than the others because:

- (1) the others were in control of the distribution;
- (2) petitioner was not present when the money was divided;
- (3) the other two were close friends;
- (4) the two main witnesses lacked credibility;
- (5) the petitioner testified as to his modest standard of living; and
- (6) the petitioner was neither knowledgeable nor sophisticated about tax laws.¹⁵⁴

Cipparone's failure to report the income, which was an insubstantial part of the proceeds of the entire conspiracy, was held not to constitute clear and convincing evidence of fraud.¹⁵⁵ Thus, a truly minor conspirator may be deemed not to have committed fraud despite his receipt of some minimal income.¹⁵⁶

Furthermore, in *United States v. Sarbello*,¹⁵⁷ a criminal fraud case, the Third Circuit held that if one conspirator clearly played a major role in a conspiracy compared to a co-conspirator who had only a minor role, then the minor conspirator's Eighth Amendment rights are violated if he is charged with the same RICO restitution penalty¹⁵⁸ as the major conspirator.¹⁵⁹

specific intent to defraud, the court found in his favor on the issue of fraud. *See id.* at 1500-01.

152. *See id.* at 1493-94.

153. *See id.* at 1494-95 (identifying petitioner's limited role in conspiracy).

154. *See id.* at 1496-97 (determining petitioner's receipt of smaller amount of income compared with other conspirators).

155. *See id.*

156. *See id.* at 1500 (finding minor member in conspiracy not fraudulent because he did not pay taxes on minimal income). This is contrary to the literal language of I.R.C. § 6663(b) (1999) (referring to *any* fraud, with no *de minimis* exception). For an interpretation of the language of I.R.C. § 6663 (b), see *supra* notes 25-30 and accompanying text.

157. 985 F.2d 716 (3d Cir. 1993).

158. This RICO restitution penalty is created by 18 U.S.C. § 1963 (1994).

159. *See Sarbello*, 985 F.2d at 724 (finding violation of Eighth Amendment when minor conspirator is given same restitution penalty as major conspirators). The court recommended a balancing test to weigh the seriousness of the crime against the severity of the sanction being imposed. *See id.* at 723 (explaining need for proportionality in non-capital punishments). Therefore, a minor member of the conspiracy (like Mr. Sarbello) had a viable claim under the Eighth Amendment if he is charged with the same RICO restitution penalty under 18 U.S.C. § 1963 as those who played a more significant role in the conspiracy. *See id.* at 724.

In *United States v. Wilson*, 742 F. Supp. 905 (E.D. Pa. 1989), *aff'd without opinion*, 909 F.2d 1478 (3d Cir. 1990) (the prior criminal trial involving the facts in *Ryan*) the jury determined that three of the four convicted men had to pay a \$5000 RICO restitution penalty, but the fourth,

Both *Cipparone* (a civil action) and *Sarbello* (a criminal action) stand for the proposition of proportionality. An obviously minor conspirator should be deemed to have received very little, or possibly nothing, compared with major conspirators.¹⁶⁰ Unfortunately for such minor players, the Service takes a “protective position,” asserting redundantly that each conspirator has received all, or almost all, of the income of the conspiracy.¹⁶¹

VII. THE SERVICE’S “PROTECTIVE POSITION”

Disproving an asserted deficiency in a consolidated conspiracy civil tax trial can prove especially difficult for any one petitioner because the Service can argue that, because of the clandestine nature of a criminal conspiracy, only the conspirators themselves can know the amount of the income of the conspiracy and how it was divided. Thus, the courts permit a redundant allocation of all of the income from the conspiracy to *each* conspirator.¹⁶² Because it protects the Service from the “whipsaw” of each petitioner claiming “the others” received all of the proceeds, this position is sometimes called the “anti-whipsaw” position. This redundant multi-allocation of the same income, called the “protective position,” has consistently been upheld by the courts.¹⁶³ Although the two

Giongo, did not have to pay any restitution penalty. *See id.* at 907. Upon motion of the United States Attorney, the District Court held each of the four men convicted to be jointly and severally liable for \$180,700, the entire sum that the jury determined to be the total fruits of the conspiracy. *See id.* at 909 (holding that joint and several liability on gross proceeds of conspiracy is consistent with “statutory scheme” of RICO).

It would seem that a minor conspirator (like Giongo) who was found by the jury to have a zero restitution penalty, and the amount of whose penalty was remolded by the court to create full joint and several liability, has had his Eighth Amendment rights abridged under *Sarbello*. *See id.* Apparently the Eighth Amendment issue was not presented on appeal in *Wilson*, because nothing in the Third Circuit’s decision reflects this issue being raised. Since *Sarbello* was decided by the same court three years later, the argument, if made in *Wilson* on Giongo’s behalf, might have prevailed. Of course, the Eighth Amendment’s effect on the RICO restitution penalty was not relevant in the civil fraud case. *See Ryan v. Commissioner*, 75 T.C.M. (CCH) 1778 (1998).

160. *See Sarbello*, 985 F.2d at 724 (differentiating minor conspirator’s role from that of major conspirator in determining the restitution-forfeiture penalty under RICO after conviction in criminal case); *Cipparone v. Commissioner*, 49 T.C.M. (CCH) 1492, 1498-1500 (1985) (same, in a civil case).

161. *See infra* Part VII for an analysis of the “protective position.”

162. *See Arouth v. Commissioner*, 64 T.C.M. (CCH) 1390 (1992) (allowing Commissioner to take protective position regarding prescription drug conspiracy). The court permitted the protective position until further information was uncovered; when no records or reliable testimony were uncovered regarding the conspirators’ division of income, the court determined that it was “appropriate to approximate the respective percentages of the sales proceeds that each petitioner received.” *Id.* at 1395. The court eventually held that the income should be allocated to each conspirator equally. *See id.* The protective position is discussed *infra* in Part VII.

163. *See id.* (upholding Service’s protective position); *Gerardo v. Commissioner*, 552 F.2d

methods most often used do not have actual names, it is useful to refer to them as the "slice of the pie" and the "act-by-act" methods.

A. *The "Slice of the Pie" Approach*

If the Service first attempts to prove the total income of the illegal enterprise and then attempts to allocate that gross sum pro rata among the conspirators, the protective position makes sense.¹⁶⁴ Once the size of the total "pie" is determined, there is a zero-sum conflict among the conspirators. If one conspirator proves his share of the profits of the entire illicit conspiracy was less than that asserted by the Service, of necessity, some other conspirator must be allocated that sum in order to keep the size of the pie constant.

A major problem with the "size of the pie" approach occurs whenever there are members of the conspiracy who were not convicted in a prior criminal fraud case, but who may have received part of the proceeds. There can be unindicted co-conspirators, conspirators who were tried and found not guilty of any RICO or tax crimes,¹⁶⁵ and members of the conspiracy who cooperated with the Service giving evidence against their co-conspirators.¹⁶⁶ Any or all of these conspirators might have received part of the entire "pie," but if no Statutory Notice had been issued to them, they would not be subject to the Tax Court's jurisdiction. Thus, there could be some difficulty in using this approach in multi-party cases where conspirators other than those before the court possibly received a share of the spoils.

B. *The Act-by-Act Approach*

When many separate illegal acts are part of a continuing conspiracy and each act possibly involves different members of the conspiracy, the Service may attempt to prove the dollar sum taken during each illegal act, and how the conspirators divided the income from each of those separate illegal acts.¹⁶⁷ The Tax Court then follows the evidence presented, focusing upon each separate

549, 555 (5th Cir. 1977) (permitting "inconsistent, alternative assessments" if each has an accepted legal basis); *Stone v. United States*, 405 F. Supp. 642, 649 (S.D. N.Y. 1975) (same).

164. Often the Service will attempt to prove the total proceeds of the RICO enterprise, and then assert relatively equal allocations to each conspirator. This makes sense when all conspirators are relatively equal "partners." In cases where there were many separate fraudulent acts, the Service may adopt the act-by-act approach, attempting to determine the profits from each act separately and dividing those proceeds among the conspirators act-by-act as the findings of fact indicate. *See Ryan v. Commissioner*, 75 T.C.M. (CCH) 1778, 1788-97 (1998).

165. *See id.* (noting that there were over a dozen unindicted co-conspirators involved in conspiracy at issue); *see also Johnson v. Commissioner*, 41 T.C.M. (CCH) 769, 773-75 (1981) (finding no fraud in the cases of unindicted co-conspirators whose testimony was not believable).

166. In *Ryan*, two former co-conspirators testified against the petitioners. *See Ryan*, 75 T.C.M. at 1784. *See also United States v. Register*, 496 F.2d 1072 (5th Cir. 1974) (involving conspirators who turned against their co-conspirators and testified at their trial).

167. *See Ryan*, 75 T.C.M. (CCH) at 1788-97 (applying act-by-act approach).

criminal act, and determines the amount, if any, received by each conspirator, act-by-act.¹⁶⁸

The logic behind the protective position is somewhat faulty in act-by-act cases. Because there is no “pie,” there is no zero-sum issue in an act-by-act fraud case. Instead, the court determines a specific dollar sum of income for each illegal event, and then determines how much of the income from each of these events is to be allocated to each conspirator.¹⁶⁹ These are findings of fact, and cannot be reversed on appeal unless clearly erroneous.¹⁷⁰ Few conspirators can effectively challenge this type of decision because of the standard of review and, therefore, the Service’s protective position is unnecessary. If there are clear findings of fact concerning the amount of money or property each conspirator received from each event, no protective position is needed, short of an unlikely finding of clearly erroneous on appeal.¹⁷¹

Even within the act-by-act approach, the Service can assert a series of protective positions. That is, the Service can determine the income generated by each illegal act and make redundant assertions of that income from each illegal act, because it can argue that only the conspirators can know how the income from each illegal act was divided. The result of this series of protective positions under the act-by-act approach will be quite similar to the result under a slice-of-the-pie approach, unless it is clear that certain conspirators did not share in the proceeds of a particular illegal act, and therefore those conspirators should not be allocated anything from that particular act.¹⁷²

In *Ryan*, there was a further complication. The two co-conspirators who testified against the others said that there had been a “policy” of sharing the proceeds of a search between the officers making the arrest and their partners and supervisors. This had the effect of inflating the amounts attributed to those who were not present at the raid. The *Ryan* decision did not attribute any of the

168. In *Ryan*, at trial the Service asserted claims against each petitioner for all or most of the proceeds from 23 separate criminal acts of the conspiracy. *See id.* at 1778-79. Of course, the Service can assert redundant “protective” sums within each alleged illegal act.

169. *See id.* at 1788-97 (showing how court determined total income received by each conspirator by looking at each criminal act and determining the profits from each act separately, then dividing those profits among the conspirators involved in that act).

170. *See* I.R.C. § 7482(a) (1999) (requiring United States Courts of Appeal to review Tax Court decisions “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury”); FED. R. CIV. P. 52(a) (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”); *see also In re King Resources Co. v. Charles A. Baer*, 651 F.2d 1326, 1335 (10th Cir. 1980) (“[A] determination by the district court of valuation is a finding of fact which will not be reversed on appeal unless clearly erroneous.”).

171. For a statement of the clearly erroneous standard, *see supra* note 170. The protective position on appeal also makes sense if the appeal is based upon some procedural error below.

172. In *Ryan*, the Service requested the court to determine the amount each petitioner received search by search. *See Ryan*, 75 T.C.M. (CCH) at 1787.

proceeds under this "policy."¹⁷³

After the Tax Court determines the liability of each taxpayer, on appeal the Department of Justice can continue the protective position by cross-appealing against each appellant. However, since the trial court's determination of the profits from each search and of each participant's share of each search is almost always within the clearly erroneous standard, there is no real possibility of reallocation of the act-by-act decision, as under a "slice of the pie" approach.¹⁷⁴

Because of the great adversarial advantage the Service gains from the protective or anti-whipsaw position, as well as because of the difficulties the Service would have in showing the division of total income amongst the clandestine conspirators, the Service will likely assert the protective position in virtually every multiparty civil fraud tax case. Assuming this position is argued by the Service, the issue is not the validity of redundant allocations for the "protective position" in either a "slice of the pie" or an "act-by-act" situation. The true issue is *when* must the Service abandon the protective position.

Unless and until the Service abandons its protective position, a minor individual conspirator cannot know the specific (non-protective position) dollar sum he must bear the burden to negate. Even if the Service reduces the amount it asserts the particular taxpayer "really" received after the testimony is complete,¹⁷⁵ it comes too late to aid the taxpayer in countering the overlarge

173. *Ryan*, 75 T.C.M. (CCH) at 1787-88.

174. See I.R.C. § 7482(a) (1998) (requiring United States Courts of Appeal to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"); see also *Commissioner v. Duberstein*, 363 U.S. 278, 289-91 (1960) (holding Tax Court factual findings must be upheld unless clearly erroneous); *Eli Lilly & Co. v. Commissioner*, 856 F.2d 855, 861 (7th Cir. 1988) (applying clearly erroneous standard to appellate review of Tax Court's reallocation of income); *Thomson v. Commissioner*, 406 F.2d 1006, 1010 (9th Cir. 1969) (recognizing that review of Tax Court's decision on apportionment of income is limited to determining whether apportionment was clearly erroneous).

Some believe that the courts of appeals have overemphasized I.R.C. § 7482(a) and ignored the preexisting I.R.C. § 7482(c)(1) (2000): "[The appellate courts] shall have power to affirm or, *if the decision of the Tax Court is not in accordance with law*, to modify or reverse the decision . . . as justice may require." (emphasis added). See David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629 (1996); David F. Shores, *Rethinking Deferential Review of Tax Court Decisions*, 53 TAX LAW. 35 (1999). Although Professor Shores primarily argues for a theory which would require the appellate courts to defer to the Tax Court on issues of law unless the decision is "not in accordance with law," he does suggest that the present standard of reviewing issues of law de novo, and issues of fact by the clearly erroneous standard is not set in stone.

175. This was done in *Ryan*, 75 T.C.M. (CCH) at 1787. It must be noted that the originally asserted deficiency in income in the Statutory Notice against Giongo was \$214,900, see *id.* at 1786, which was reduced to \$25,966 after trial, when the protective position was dropped. See *id.* at 1787. The deciding judge found Giongo's unreported income totaled \$7150 from four searches: Lees, \$650, see *id.* at 1791; Roeder, \$5000, see *id.* at 1793; Carr, \$500, see *id.* at 1794; and Megna, \$1000. See *id.* at 1795. This dramatizes the inequity of the protective position to marginal

redundant protective assertions.

VIII. THE SERVICE'S BURDEN OF PROOF OF FRAUD: COLLATERAL ESTOPPEL

The Service must prove a taxpayer's fraud by clear and convincing evidence.¹⁷⁶ Although it can attempt to prove fraud in several ways, the most common method is to collaterally estop a petitioner from denying he was fraudulent after a prior criminal conviction against the petitioner.¹⁷⁷ Even when collateral estoppel does not preclude a petitioner's denial of all of the essential elements of fraud, partial collateral estoppel may still preclude his denial of at least some of the elements of fraud.¹⁷⁸

Collateral estoppel does not have statutory roots; it is a judge-made rule designed to promote judicial economy.¹⁷⁹ It arises *only* if there has been a prior judicial determination that is relevant to a later case between the same parties.¹⁸⁰

conspirators.

176. See I.R.C. § 6663 (b) (added by OMBRA 1989).

177. See, e.g., *Gray v. Commissioner*, 708 F.2d 243, 246 (6th Cir. 1983). The court in *Gray* prior criminal conviction for income tax evasion to preclude the taxpayer from attempting to disprove fraud in subsequent civil tax fraud matter by collateral estoppel). See *id.* at 248. However, the dissent felt that a plea of guilty should not create collateral estoppel when the defendant was not apprised of the collateral effects of his plea, and he had no full and fair opportunity to litigate the issues. See *id.* 247-48 (Merritt, J., dissenting). *Plunkett v. Commissioner*, 465 F.2d 299, 307 (7th Cir. 1972) (holding prior tax evasion conviction after guilty plea produces the same collateral estoppel as a trial on merits concerning issue of civil fraud in civil proceeding); *Amos v. Commissioner*, 360 F.2d 358 (4th Cir. 1965) (same); *Moore v. United States*, 360 F.2d. 353 (4th Cir. 1965) (same in refund suit).

178. See, e.g., *Cadwell v. Commissioner*, 70 T.C.M. (CCH) 1318, 1320 (1995) (summary judgment motion by Service granted in civil case because of collateral estoppel from prior criminal conviction for the same taxable years; concerning years not involved in the criminal conviction, taxpayer was found to have committed fraud based on the "badges of fraud" analysis); *Considine v. Commissioner*, 68 T.C. 52 (1977) (finding that taxpayer's prior criminal conviction of filing a false return had partial collateral estoppel effect on proving I.R.C. § 6653(b) violation). But see *Wright v. Commissioner*, 84 T.C. 636 (1985) (limiting the scope of collateral estoppel from a conviction for filing a false return in a subsequent civil case). *Wright* is discussed *infra* notes 194-99 and accompanying text.

179. See David H. Brown, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, 73 CORNELL L. REV. 817, 821 (1988) (commenting on usefulness of collateral estoppel theory, stating that courts clearly have accepted efficiency as justification for doctrine, and arguing that decisions of administrative agencies sitting in judicial capacity should also invoke the doctrine of collateral estoppel); Eli J. Richardson, *Taking Issue with Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 46 (1995) (identifying purposes behind common law collateral estoppel doctrine: conservation of judicial resources, preservation of court system integrity by preventing inconsistent resolution of issues, promotion of finality of judgments and protection of defendants from repetitive litigation).

180. See *Montana v. United States*, 440 U.S. 147, 153 (1979) (citing *Parklane Hosiery Co.*

Thus, no estoppel can arise from a prior case settled with the Service, because a settlement is not a judicial determination.

The leading Supreme Court case dealing with collateral estoppel, *Commissioner v. Sunnen*,¹⁸¹ is a tax case.¹⁸² Explaining *Sunnen*, the Court in *Montana v. United States*¹⁸³ stated that collateral estoppel exists when all three prongs of the following test are satisfied:

- (1) the issues in the second case are substantially the same as those resolved in the first;
- (2) there has been no significant change in the facts or law since the first case; and
- (3) there are no special circumstances that permit the court to deviate from the usual rules of preclusion.¹⁸⁴

In civil tax cases one must differentiate fraud cases from non-fraud cases in discussing collateral estoppel. In non-fraud cases, collateral estoppel can only arise when the same parties (or their privies) are contesting an issue that has been judicially determined in a prior case.¹⁸⁵ This can only occur if in two separate taxable years, the same taxpayer (or his privy) is involved.¹⁸⁶ Each taxable year creates a separate cause of action, therefore if the taxpayer is the same for each of two or more taxable years, and if the facts and law have not significantly changed, there is no need to relitigate any issue actually decided in the first case.¹⁸⁷

v. Shore, 439 U.S. 322, 326 n.5 (1979)) (discussing role of collateral estoppel); *Commissioner v. Sunnen*, 333 U.S. 591, 597-98 (1948) (requiring actual judicial determination before collateral estoppel may attach); *Trapp v. United States*, 177 F.2d 1, 4 (10th Cir. 1949) (construing collateral estoppel doctrine narrowly in non-fraud tax cases).

181. 333 U.S. 591 (1948).

182. See *id.* at 594-95 (not a fraud case; discussing whether husband received taxable income from royalties assigned to him by his wife on same facts and law over succeeding years).

183. 440 U.S. 147 (1979).

184. See *id.* at 155 (enumerating necessary inquiries to determine appropriate application of collateral estoppel).

185. See, e.g., *Sunnen*, 333 U.S. at 598 (stating that doctrine prohibits relitigation of matters actually litigated and judicially determined in prior proceeding); *Commissioner v. Thomas Flexible Coupling Co.*, 198 F.2d 350, 353 (3d Cir. 1952) (recognizing that estoppel applies only to controverted points actually determined in previous suit, not from settlements).

186. See *Sunnen*, 333 U.S. at 599 ("[W]here two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice."); *Tait v. Western Md. Ry. Co.*, 289 U.S. 620, 624 (1933) (recognizing that doctrine is applicable only when two or more separate tax years are involved).

187. See *Sunnen*, 333 U.S. at 599 ("[C]ollateral estoppel . . . is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally."); *Jones v. United States*, 466 F.2d 131, 134-35 (10th Cir. 1972) (applying collateral estoppel when subsequent claim was between same parties as in prior case, arose under same contractual arrangement, applicable tax laws had not changed, and the only difference was taxable years involved).

In a civil fraud case in which a taxpayer has been convicted of a tax crime, or certain other crimes, for the same taxable years as in the subsequent civil tax fraud case, each essential element of those crimes should not be relitigated.¹⁸⁸

If, in a civil fraud case, there has not been a prior criminal trial, or if the taxpayer has been acquitted in a criminal trial, collateral estoppel cannot arise, because there was no prior judicial determination concerning any of the essential elements of fraud.¹⁸⁹ Even if there were no prior criminal cases or convictions of the taxpayer and, therefore, no collateral estoppel, the Service can still proceed with the civil fraud tax case.¹⁹⁰

When collateral estoppel does not itself prove all of the elements of fraud, the Service can use partial collateral estoppel to preclude relitigation of at least

188. See *Blohm v. Commissioner*, 994 F.2d 1542, 1554 (11th Cir. 1993) (holding that criminal tax fraud conviction after plea estops taxpayer from denying liability for civil fraud under I.R.C. § 6653 (b) for same year); *Klein v. Commissioner*, 880 F.2d 260, 262 (10th Cir. 1989) (same).

189. See *Helvering v. Mitchell*, 303 U.S. 391, 397-98 (1938) (holding that taxpayer's prior acquittal of attempted tax evasion did not bar Commissioner from asserting civil penalty for same year). "The difference in degree of burden of proof in criminal and civil cases precludes application of [collateral estoppel in this instance]." *Id.* at 397 (discussing different nature of civil and criminal cases concerning payment or evasion of taxes). A taxpayer's victory in a criminal tax fraud case means merely that the Government did not prove every element beyond a reasonable doubt. See *id.* (noting criminal acquittal did not imply party had not "willfully attempted to evade the tax" civilly). If the government has failed to prove any element of the crime charged beyond a reasonable doubt, it is still possible for the Service to prove the lesser standard of "clear and convincing evidence." See *id.* at 397-98 (stating that, in such instance, some issues presented were litigated and determined in criminal proceeding). Accordingly, it is not significant for collateral estoppel purposes that the taxpayer was acquitted in criminal case. See *id.* (noting difference in standards of proof do not prevent subsequent civil case when criminal case failed). Collateral estoppel is therefore a no-win situation for the taxpayer: heads the Service wins, tails the taxpayer loses.

190. See, e.g., *Traficant v. Commissioner*, 884 F.2d 258, 263 (6th Cir. 1989) (holding taxpayer's acquittal on RICO bribery and criminal filing of a false return charges did not bar civil tax fraud proceeding on issue preclusion grounds); *Neaderland v. Commissioner*, 424 F.2d 639, 641 (2d Cir. 1970) (holding acquittal of taxpayer in prior criminal prosecution did not bar finding of tax fraud in civil proceeding through doctrine of collateral estoppel).

The civil fraud addition to tax prescribed by I.R.C. § 6663(b) is not criminal, but rather remedial, in nature. See *Mitchell*, 303 U.S. at 401 ("The remedial character of sanctions imposing additions to a tax has been made clear by this Court . . . [t]hey are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."). Thus, because the second case is civil, not criminal, there is no double jeopardy issue. See *id.* at 404 (holding that remedial sanction does not duly burden defendant in civil enforcement action). But especially when it is quite apparent that the Service will collect little or nothing from the petitioners who have spent or forfeited their profits and have few assets, this rationale makes no sense.

some of the elements of fraud which had been determined in the prior case.¹⁹¹ In that situation, the Service can still prove the missing elements of fraud by other means, usually with a "badges of fraud" argument.¹⁹²

Collateral estoppel, as applied to a civil fraud tax case, prevents only the relitigating of any determinations *necessarily* made in a prior criminal case between the particular taxpayer and the United States, and for the same taxable year or years.¹⁹³ In cases where a taxpayer has been found guilty of some crime necessarily requiring the receipt of money or its equivalent, collateral estoppel prevents the relitigation concerning the receipt of money.¹⁹⁴ However, collateral estoppel cannot preclude relitigation of any determinations that were not necessary to the prior criminal conviction.¹⁹⁵

If collateral estoppel exists from a prior criminal case, the extent of how that doctrine affects a later civil tax fraud case depends on the specifics of that prior conviction.

191. See, e.g., *Cadwell v. Commissioner*, 70 T.C.M. (CCH) 1318 (1995) (granting Service's summary judgment motion for tax fraud violation under I.R.C. § 6663(b) (1999), when Service invoked the doctrine of collateral estoppel based upon a guilty plea to tax evasion under I.R.C. § 7201 for two years, and a "badges of fraud" analysis for other years); *Huff v. Commissioner*, 56 T.C.M. (CCH) 838 (1988) (holding that plea of guilty for one year of criminal tax fraud collaterally estops taxpayer from denying willfulness element of civil fraud, but for other years a bank deposits analysis and application of the badges doctrine of fraud satisfies burden of Service to prove fraud).

192. *Alexander Shokai, Inc. v. Commissioner*, 34 F.3d 1480, 1487 (9th Cir. 1994) (listing "badges of fraud," including understatements of income, inadequate records, implausible or inconsistent explanations of behavior, concealment of assets, failure to co-operate with tax authorities, and a lack of credibility of taxpayer's testimony); *Bradford v. Commissioner*, 796 F.2d 303, 307 (9th Cir. 1986) (stating court may infer fraudulent intent through circumstantial "badges of fraud"); *Toussaint v. Commissioner*, 743 F.2d 309, 312 (5th Cir. 1984) (same).

193. Cf. I.R.C. § 7422(c) (when *res judicata* applies, the "identical party test" is satisfied even though Department of Justice prosecuted criminal case and Department of Treasury tries civil fraud case); the same rule should apply to collateral estoppel because both are grounded on the same juridical purpose. See also *Tait v. Western Md. Ry. Co.*, 289 U.S. 620, 627 (1933) ("[W]here a question has been adjudged as between a taxpayer and the government or its official agent. . . the collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment.").

194. See, e.g., *Brown v. Commissioner*, 42 T.C.M. (CCH) 579 (1981) (granting summary judgment to Service after criminal conviction for false filing on subsequent assertion of civil fraud penalty [note that this case preceded *Wright*, discussed *infra* notes 201-06, granting only partial collateral estoppel]); *Rodney v. Commissioner*, 53 T.C. 287, 306 (1969) (holding taxpayer's prior conviction on criminal tax fraud estops him from denying civil tax fraud for same year; however, spouse of criminal is not estopped by his conviction).

195. See *Montana v. United States*, 440 U.S. 147, 153 (1979) (requiring controverted issue to be "actually and necessarily determined" in prior case before collateral estoppel doctrine can apply); *Fitzpatrick v. Commissioner*, 70 T.C.M. (CCH) 1357, 1359 (1995) (stating that closing letter from the Service is not a judicial determination and therefore cannot generate collateral estoppel).

A. If the Taxpayer Has Been Convicted of Criminal Tax Fraud

Collateral estoppel prevents a petitioner from relitigating any of the elements of fraud because the elements of criminal tax fraud and civil tax fraud are identical.¹⁹⁶ Because fraud had to have been proven beyond a reasonable doubt in the criminal trial, a fortiori the lesser standard of clear and convincing evidence is satisfied. In the subsequent civil fraud case, the Service has automatically carried its burden of proving fraud by a complete collateral estoppel from the prior criminal case. Therefore, the Tax Court must merely determine the amount of the deficiency for each petitioner.¹⁹⁷

B. If the Taxpayer Has Been Convicted of Willfully Filing a False Tax Return

“Willfully” has the same meaning for filing a false return as for fraud.¹⁹⁸

196. See *Gray v. Commissioner*, 708 F.2d 243, 246 (6th Cir. 1983) (“The elements of criminal tax evasion and civil tax fraud are identical.”); *Hicks Co. v. Commissioner*, 470 F.2d 87, 90 (1st Cir. 1972) (same); *Moore v. United States*, 360 F.2d 353, 356 (4th Cir. 1965), *cert. denied*, 385 U.S. 1001 (1967) (recognizing that criminal tax evasion conviction necessarily involves same ultimate factual determinations needed for finding of fraud under I.R.C. § 6653 (b)); *Amos v. Commissioner*, 360 F.2d 248 (4th Cir. 1965) (same). Although these cases were decided under I.R.C. § 6653 (repealed in 1989), the definition of fraud was not changed for I.R.C. § 6663 (added in 1989).

197. See *Gray*, 708 F.2d at 250 (stating that a guilty plea has given taxpayer his day in court, and acts as complete collateral estoppel). But see *id.* at 247 (dissent, stating that there are other reasons for a guilty plea, not every fact has been determined, and taxpayer had not been warned of collateral effects of plea) (Merritt, J., dissenting). See also Note, *Collateral Estoppel in Civil Tax Fraud Cases Subsequent to Criminal Conviction*, 64 MICH. L. REV. 317, 322 (1965) (recognizing that application of complete collateral estoppel in this instance may not save time or conserve judicial resources). In establishing criminal tax evasion, the Service need not prove the exact amount of the evasion. See *id.* (noting that only some amount of evasion must be proven to establish willful evasion). Therefore, the exact deficiency to which the present seventy-five percent penalty imposed by I.R.C. § 6663 (a) will attach is still subject to litigation. See *id.* (recognizing that taxpayer is collaterally estopped from relitigating issue of fraud in subsequent action). To determine the precise amount of deficiency, the court must perform a review of the taxpayer’s every item of income and expense for the year, and careful consideration of this evidence involves many judicial hours. See *id.* (noting that collateral estoppel only applies to findings of fact “upon which the prior conviction necessarily rests”). Therefore, “whether or not collateral estoppel is applied, the court must re-examine the voluminous evidence.” *Id.*

198. *United States v. Bishop*, 412 U.S. 346, 360 (1973) (holding that willfully means voluntary, intentional violation of known legal duty, or bad faith and evil intent); see also Daniel Anker, Comment, *Cheek v. United States: Beliefs That Tax Credulity Still Get to the Jury*, 41 CASE W. RES. L. REV. 1311, 1314 (1991) (discussing mens rea element in federal tax jurisprudence). Commentators have discussed the meaning of the term “willfully” in tax statutes in terms of the theory of mens rea:

In tax statutes, “the word ‘willfully’ . . . generally connotes a voluntary, intentional

However, fraud requires proof of an intent to evade taxes,¹⁹⁹ while filing a false return does not.²⁰⁰

In the leading Tax Court case on collateral estoppel in this context, *Wright v. Commissioner*,²⁰¹ the Tax Court reversed its prior holding,²⁰² limiting collateral estoppel from a criminal conviction for filing a false return. Only those essential elements of tax fraud²⁰³ which are also essential elements of filing a false return create collateral estoppel.²⁰⁴ The court held that there was no complete collateral estoppel in this situation because a necessary element of fraud—the intent to evade taxes—is not an element of the crime of filing a false return.²⁰⁵

violation of a known legal duty. It [may be] 'bad faith or evil intent,' or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer.' [Courts] . . . seek[] an "element of mens rea" where the tax law uses the word "willfully," in order to "implement[] the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."

Id.; Richard A. Carpenter, *Practical Guide to Understanding Criminal Tax Matters*, 60 TAX'NFOR ACCT. 292, 292 (1998) (noting that during most recent reporting period federal grand juries indicted 2,282 individuals for tax crimes leading to eighty-nine percent conviction rate). The most frequent form of tax violation is filing a false income tax return. *See id.* at 293 (noting that these returns substantially understate income or overstate deductions).

199. *See* elements of fraud, *supra* note 4 and accompanying text.

200. *See Wright v. Commissioner*, 84 T.C. 636, 639-43 (1985) (discussing burdens of proof and elements necessary for conviction under filing of a false return under I.R.C. § 6206(1)); *see also* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 811 (1993) (proposing economic explanation of mens rea including tax crimes.)

201. 84 T.C. 636 (1985).

202. *See Goodwin v. Commissioner*, 73 T.C. 215 (1979).

203. *See supra* note 4 and accompanying text.

204. *See Wright*, 84 T.C. at 643-44 (stating that conviction was a fact to be considered at trial) (overruling prior collateral estoppel rule where a false filing conviction created collateral estoppel in civil fraud trial established in *Goodwin v. Commissioner*, 73 T.C. 215 (1979)). *See generally* Murray H. Falk, *Collateral Effects of the Criminal Tax Case*, C254 ALI-ABA 239, 239-45 (1988) (discussing collateral estoppel in civil and criminal tax cases); Martin M. Lore & Marvin J. Garbis, *Denial of Fraud Was Not Collaterally Estopped*, 62 J. TAX'N 377, 377-78 (1985) (discussing holding in *Wright*).

205. *See Wright*, 84 T.C. at 641 (stating that "the intent to evade taxes is not an element of the crime covered by section 7206(1)"); *see also* I.R.C. § 7206(1) (1999) (establishing basis of culpability for fraud and false statements). Section 7206(1) provides, in relevant part:

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony. . . .

Id. For a treatment of other cases holding that the intent to evade taxes is not an element of the crime covered by I.R.C. § 7206(1), *see United States v. Tsanas*, 572 F.2d 340, 343 (2d Cir.), *cert.*

The Service must prove this missing element by presenting other evidence of an intent to evade taxes, urging the Tax Court to find the missing intent element "on all of the facts."²⁰⁶ For example, in *Ryan*, the court held that a conviction under RICO in the same year as the filing of a false return is sufficient to constitute fraud, even if none of the predicate acts underlying the RICO conviction require the receipt of money.²⁰⁷ Thus, with only partial collateral estoppel (from the elements common to fraud and filing a false return), the

denied, 435 U.S. 995 (1978) (comparing elements of crimes covered by § 7201 and § 7206(1) and finding latter is lesser included offense of the former); *United States v. DiVarco*, 484 F.2d 670, 673-74 (7th Cir. 1973) (noting that proof of specific intent to evade taxes was not required in such matters); *Siravo v. United States*, 377 F.2d 469, 472 n.4 (1st Cir. 1967) ("[I]ntent to evade taxes is not an element of the crime charged under [section 7206(1)]."); *United States v. Hans*, 548 F. Supp. 1119, 1123-24 (S.D. Ohio 1982) (distinguishing between elements of § 7201 actions and elements of § 7206(1) actions regarding proof of willful intent).

206. See I.R.C. § 7482 (establishing standard of review on appeal). Such a finding of fact will normally not be reversible, because the standard for review of Tax Court decisions under I.R.C. § 7482(a) is the same as an appeal from a district court in a non-jury civil case. See *id.* The standard for appeal from a decision of the District Court is that no case can be reversed unless the findings of fact are clearly erroneous. See generally *Farcasanu v. Commissioner*, 436 F.2d 146, 148 (D.C. Cir. 1970) (holding that burden rests with appellant to show that findings that Romanian Communist government's confiscation of his property constituted theft for tax purposes; were clearly erroneous); *Baldwin Bros., Inc. v. Commissioner*, 361 F.2d 668, 670 (3d Cir. 1966) (holding that burden is on taxpayer to establish that challenged ruling of tax court was arbitrary).

207. The overwhelming number of conspirators convicted in any RICO case are convicted of predicate acts requiring the receipt of money or property. See G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1423 (1996) (discussing RICO criminal and civil accomplice liability). The Service makes the inference that this assumed receipt of money or property which is not reported equals fraud. See also Pamela H. Bucy, *Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves*, 29 ARIZ. ST. L.J. 639, 669 (1997) ("Whenever the income not reported or taxes evaded arise from fraudulent activity, the tax fraud charges may "piggy-back" other charges arising from the fraud, such as RICO, embezzlement, or money laundering."). This is true, assuming the willfulness element of fraud is satisfied. However, where the jury has found guilt only of conspiracy or aiding and abetting, there is no necessary finding of the receipt of money; therefore, the taxpayers are not estopped to deny the receipt of money in the later civil suit. See *Ryan v. Commissioner*, 75 T.C.M. (CCH) 1778, 1797 (1998).

See also *United States v. Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996) (holding that on retrial of certain counts of a RICO case, collateral estoppel precluded government from using predicate acts of which defendants had been acquitted in first trial as "an essential element" of mistried counts).

Of course, when the trial court finds on all the facts that a petitioner actually received money from the conspiracy, the practical result is the same, but it is not derived from collateral estoppel. See *Ryan* 75 T.C.M. at 1789-97.

Service can still prove the other elements of civil fraud by other means.²⁰⁸ This would satisfy the element of evasion not supplied by collateral estoppel, and thus could prove fraud by clear and convincing evidence.

C. If the Taxpayer Has Committed Some Non-Tax Crime

The taxpayer cannot relitigate any essential element of a prior judicial determination.²⁰⁹ Therefore, if the receipt of money or its equivalent is an essential element of the crime for which the petitioner was convicted, such as for robbery or bribery, the petitioner cannot deny the receipt of money or its equivalent.

On the other hand, if the prior criminal conviction is for a crime such as aiding and abetting robbery, which in most statutes does not have the receipt of money or equivalent as an essential element of that crime, collateral estoppel alone cannot bar the taxpayer from attempting to show he received no income.

D. If the Taxpayer Has Been Convicted of the Crime of Conspiracy

No collateral estoppel can arise from a prior conviction for conspiracy unless the statute, federal or state, defines conspiracy as requiring the receipt of money or the equivalent.²¹⁰

If the taxpayer has been convicted of RICO conspiracy,²¹¹ that violation must

208. See Carpenter, *supra* note 198, at 293 (discussing badges of fraud and fact that badges can be used as means of inferring fraud on part of the taxpayer). While looking for fraudulent behavior, the IRS looks for certain "badges of fraud" including:

[A] consistent pattern by the taxpayer of underreporting income or overstating deductions, omission of an entire source of income on a tax return, claiming completely fictitious deductions, keeping two sets of books or no books at all, making false entries in the books, providing the accountant with false information concerning the preparation of the tax return, destroying tax records, . . . filing a False form W-4 with an employer claiming excess exemptions to reduce the taxes withheld, backdating tax records, dealing in large sums of cash without an adequate explanation, concealment of bank accounts . . . and other property.

Id. (noting that taxpayer must have acted voluntarily and intentionally); see also *infra* Part IX.

209. See, e.g., Instituto Nacional De Comercializacion Agricola v. Continental Ill. Nat'l Bank & Trust Co., 858 F.2d 1264, 1271 (7th Cir. 1988) (not a tax case; holding that issues actually litigated for purposes of criminal conviction conclusively establish those issues for later federal civil litigation); Fidelity Stand. Life Ins. Co. v. First Nat'l. Bank, 510 F.2d 272, 273 (5th Cir. 1975) (not a tax case; holding collateral estoppel applies to bar relitigation of identical issues, even where prior state court judgment is subject to appellate review; also uses full faith and credit argument); Kiker v. Hefner, 409 F.2d 1067, 1068 (5th Cir. 1969) (holding collateral estoppel applies to bar relitigation even where prior judgment was clearly incorrect, as long as issue could have been raised).

210. See Musslewhite, *supra* note 23, at 650 (noting that automatic application of collateral estoppel is inappropriate).

211. Organized Crime Control Act, Title IX, 18 U.S.C. §§ 1961-68 (1994).

be based upon at least two "predicate" criminal acts which underlie the conspiracy.²¹² If the predicate crimes of which a RICO defendant was found guilty necessarily require the receipt of money or the equivalent, the taxpayer will be estopped from denying such receipt.²¹³ If, however, the predicate crimes do not necessarily require the receipt of money, collateral estoppel cannot bar the taxpayer from contesting the assertion of his receipt of unreported income.²¹⁴ The Service must then prove the fraudulent receipt of income by other means.

IX. THE SERVICE'S BURDEN OF PROOF OF FRAUD: "BADGES OF FRAUD"

Tax fraud is usually proven by circumstantial evidence.²¹⁵ The most common way is by matching the taxpayer's actions against those "badges of fraud" that have been used since the days of English common law.²¹⁶ In the context of tax

212. See *id.* § 1961(5) (requiring at least two predicate acts in furtherance of conspiracy).

213. See *supra* note 209 and accompanying text (discussing importance of commission of non-tax crime in relationship to collateral estoppel in civil fraud case); see also 18 U.S.C. § 2 (establishing statutory elements of aiding and abetting). The general provisions of 18 U.S.C. § 2 provide, in relevant part:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Id.

214. See *supra* notes 209-13 and accompanying text (noting that in conviction for conspiracy, collateral estoppel cannot arise unless state defines conspiracy as requiring receipt of money or property). For general discussions of aiding and conspiracy abetting in both criminal and civil contexts, see Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1 (1994) (discussing statutory and judicial treatment of aiding and abetting).

215. See *Bradford v. Commissioner*, 796 F.2d 303, 307 (9th Cir. 1986) ("Because fraudulent intent is rarely established by direct evidence, this court has inferred intent from various kinds of circumstantial evidence."); *Hicks Co. v. Commissioner*, 56 T.C. 982, 1019 (1971), *aff'd*, 470 F.2d 87 (1st Cir. 1972) (noting that requisite specific intent necessary to prove existence of fraud is rarely susceptible of direct proof); see also Reed Tinsley & Joseph V. Pease, Jr., *Guidelines for Protecting the Tax Practitioner from Criminal Liability*, 40 TAX'NFORACCT. 94, 95 (1988) (stating that knowledge of fraud is usually established by circumstantial evidence).

216. See Peter A. Alces, Comment, *Fraud Bases of Bulk Transferee Liability*, 63 Temp. L. Rev. 679, 685-87 (1990). Alces noted:

Fraudulent disposition law developed early in commercial jurisprudence, claiming roots in the Roman statutes, and assuming the form we would perhaps first recognize in the Statute of 13 Elizabeth, a penal statute. Accordingly, liability under the specific language of the statute was actual fraud liability. . . . Recognition of constructive fraud liability began in earnest with *Twyne's Case* [76 Eng. Rep. 809 (Star Chamber 1601)]. In that case, the court enumerated the . . . "badges of fraud" as an adjunct of actual fraud liability. . . . Development of the badges, and therefore, the bases of constructive fraud liability, resulted from an evidentiary predicament: how to prove an actual intent to

fraud, the "badges of fraud" are not only indicia of fraud generally, but they may also provide specific evidence of the intent to evade taxes, a necessary element of fraud.

Some of the more common "badges of fraud" that may arise in a civil tax fraud case include:

- A. A Pattern of Understatement.
- B. Concealment of Assets or Sources of Income.
- C. Dealings in Cash.
- D. Failure to Maintain Books and Records.
- E. Engaging in Illegal Activities.
- F. Attempting to Conceal Illegal Activities.
- G. Failure to Cooperate with Tax Authorities.
- H. Showing a Willingness to Defraud Business Associates or Others.
- I. Taxpayer's Sophistication, Education, and Knowledge of Duty to Report Income.
- J. Giving Implausible Explanations.²¹⁷

A. A Pattern of Understatement

Repeated understatement of taxable income by a taxpayer is considered a major badge of fraud.²¹⁸ The Service will use testimony and other evidence to show repeated understatements of the receipt of money from criminal activities.²¹⁹ To the extent the testimony and corroboration are credible, such

hinder, delay, or defraud

Id. See also Mary Leiter Swick, *The Power of Avoidance: A Bankruptcy Perspective on the Developing Law of Fraudulent Transfers in Nebraska*, 25 CREIGHTON L. REV. 577 (1992) (noting that American courts adopted and expanded English common law badge of fraud concepts).

217. See *Estate of Upshaw v. Commissioner*, 416 F.2d 737, 741 (7th Cir. 1969), *cert. denied*, 397 U.S. 962 (1970) (Tax Court's finding of fraud is a fact determination and is subject to clearly erroneous standard on appeal; citing taxpayer's failure to keep adequate books and records as indicia of fraud); *O'Connor v. Commissioner*, 412 F.2d 304, 310 (2d Cir. 1969) (noting taxpayer's experience and knowledge of tax law as a CPA is indicia of fraud); *Foster v. Commissioner*, 391 F.2d 727, 733 (4th Cir. 1968) (noting failure to report the size and frequency of omissions from income over extended period of time as indicia of fraud); *Henry v. Commissioner*, 362 F.2d 640, 643 (5th Cir. 1966) (discussing concealment of bank accounts as indicia of fraud); *Estate of Granat v. Commissioner*, 298 F.2d 397, 398 (2d Cir. 1962) (indicating that omissions of income and failure to provide access to records is indicia of fraud). *Afshar v. Commissioner*, 41 T.C.M. (CCH) 1489, 1509 (1981), *aff'd*, 692 F.2d 751 (4th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) (noting that taxpayer's fraud in business transaction may point toward a willingness to defraud government); see also INTERNAL REVENUE MANUAL § 4231 (1998) (listing common badges of fraud).

218. See *Holland v. United States*, 348 U.S. 121, 139 (1954) (holding evidence of consistent pattern of underreporting large amounts of income supports inference of willfulness on part of taxpayer); *cf.* *Cipparone v. Commissioner*, 49 T.C.M. (CCH) 1492 (1985) (noting minimal underreporting of income from illegal kickback scheme not fraudulent).

219. See I.R.C. § 7201 (1999) (establishing penalties for willful tax evasion); *United States*

evidence indicates the receipt of unreported money.²²⁰ At this stage, where the sole issue is whether or not there was fraud, there is no need for the Service to show the precise amounts received by a particular taxpayer in a conspiracy. Any recurring receipt that is properly included in gross income, which is not reported as taxable income, or any recurring deductions that are not proper, can create a "pattern."²²¹

A "pattern" will be found to exist if there are several instances of such unreported income, possibly even if they are within a single year.²²² Of course, a "pattern" cannot be established if there is a single incident. But are two incidents sufficient to constitute a pattern? If not, what is the minimum number which will constitute a pattern?

In any year for which the taxpayer has been convicted of filing a false return, under I.R.C. § 7206(1) (1999), the Service will treat that year as part of a pattern of understatement, thereby helping prove the intent to evade.²²³ However, this reasoning is circular and illogical. In *Wright*, the Tax Court decided that a conviction for filing a false return under I.R.C. § 7206(1) (1999) does not equal fraud, because the required intent to evade tax is not an element of I.R.C. § 7206(1) (1999).²²⁴ It is quite illogical to say that § 7206(1) requires an additional

v. Larson, 612 F.2d 1301, 1305 (8th Cir. 1980) (holding consistent pattern of understatement of income may be used to establish essential element of willfulness); *Upshaw's Estate*, 416 F.2d at 741 (holding that consistent pattern of understatement of substantial amounts of income over period of years is not mere understatement and is persuasive evidence of fraudulent intent to evade taxes); *Kramer v. Commissioner*, 389 F.2d 236, 239 (7th Cir. 1968) (holding taxpayer systematically under reported large amounts of income over number of years (citing *Holland*, 348 U.S. at 139)).

220. See *Ryan v. Commissioner*, 75 T.C.M. (CCH) 1778, 1797-98 (1998) (discussing proof of willfulness through pattern of under-reporting).

221. See *Cipparone*, 49 T.C.M. at 1500 (a few dollars of understated income might not suffice to constitute a clear underpayment or a "pattern"); see also *Holland*, 348 U.S. at 138 (noting that Government must prove every element of offense beyond reasonable doubt).

222. The "pattern" of understatement usually refers to year-to-year understatements, however, one might argue that a "pattern" could be discerned from multiple under reporting of items of income or overstating deductions within one year.

Prior to passage of I.R.C. § 7525 (1998) (added in 1998 by P.L. 105-206), which created a practitioner-client privilege, the Service could have subpoenaed the records of the taxpayer's accountant to gather evidence of a possible pattern. See *Kenneth Winter & Robert Carney, Dealing Without an Accountant-Client Privilege*, 53 TAX'NFORACCT. 356, 362 (1994) (noting that because there was no accountant-client privilege, Service often tried to establish intent via pattern of understatement in multiple years using accountant's papers). Obviously, I.R.C. § 7525 will make it harder for the Service to show a "pattern" for multiple years.

223. See *Ryan*, 75 T.C.M. (CCH) at 1798 (this type of assertion was made with respect only to petitioner Giongo).

224. See *Wright v. Commissioner*, 84 T.C. 636, 643 (1985) (discussing elements of § 7206(1)). Refer to *supra* note 4 and accompanying text listing the three elements of fraud. Only the intent to evade was missing in *Wright*. See *Wright*, 84 T.C. at 643. The *Wright* court noted: "In a criminal action under section 7206(1), the issue actually litigated and necessarily determined

factor to show fraud, and then attempt to prove that additional factor by invoking § 7206(1) itself.

B. Concealment of Assets or Sources of Income

Obviously, concealment of assets or sources of income is, and should be, a prime badge of fraud.²²⁵ Unexplained income and an unexplained accumulation of assets, or both, strongly suggest the receipt of unreported income. The attempted concealment of such income and assets further implies there is something to hide. Both civil and criminal fraud may be shown by an indirect method of determining a taxpayer's unreported income under a "net worth," a "cash expenditures," or a "bank deposit" method.²²⁶ To be convincing, the

is whether the taxpayer voluntarily and intentionally violated his or her known legal duty not to make a false statement as to any material matter on a return." *Id.* See also *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (holding willfully simply means voluntary, intentional violation of known legal duty); *United States v. Bishop*, 412 U.S. 346, 361 (1973) (willfully has same meaning for tax misdemeanors and felonies).

225. See *Spies v. United States*, 317 U.S. 492, 499 (1943) (discussing tax evasion and holding that motive and concealment of assets and other willful attempts to evade must be shown); *Gendelman v. United States*, 191 F.2d 993, 996 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952), (noting government was not required to prove exact amounts of unreported income); *Braswell v. Commissioner*, 66 T.C.M (CCH) 627 (1993) (noting questionable tax practices and fraud through use of charitable contributions).

226. See BORIS I. BITTKER & MARTIN J. MCMAHON, JR., *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶¶ 43.2-43.4 (2d ed. 1995); see also I.R. MANUAL HANDBOOK 9.5, *THE INVESTIGATIVE PROCESS*, Ch. 9 Method of Proof [9.5]-[9.7] for official detail of these methods.

The Court in *Holland* was acutely aware of the inherent pitfalls in the employment of the net worth method:

As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

...

While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute.

Charges should be especially clear, including, in addition to the formal

unexplained funds and assets should clearly be *substantially* in excess of what a person with the same reportable taxable income could reasonably be expected to accumulate or to spend.²²⁷

C. Dealings in Cash²²⁸

The practice of dealing in cash is a badge of fraud that overlaps the preceding badge, because concealment of income is usually accomplished by the receipt and payment of cash, which unlike checks and credit cards, does not leave a traceable record. Because all taxpayers generally conduct at least some transactions in cash, this badge must refer to the excessive use of cash by a petitioner relative to his economic level. On the other hand, there are some who, for whatever reason, do not trust banks.²²⁹

But if a taxpayer who had been dealing primarily with checks and credit cards began dealing exclusively with cash around the time of the conspiracy, it would be an especially strong indication of fraud.

instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

Holland, 348 U.S. at 127-29. See generally Ian M. Comisky, *The Likely Source: An Unexplored Weakness in the Net Worth Method of Proof*, 36 U. MIAMI L. REV. 1 (1981) (discussing weaknesses of net worth method and noting that government has used net worth method for over fifty years).

227. Cf. Cipparone v. Commissioner, 49 T.C.M.(CCH) 1492 (1985) (discussing unreported insubstantial income as result of bribery and kickback scheme).

228. See Spies v. United States, 317 U.S. 492, 500 (1943) (noting that defendant insisting on cash transactions and keeping cash accounts under family members' names are indicia of fraud); Pittman v. Commissioner, 100 F.3d 1308, 1314 (7th Cir. 1996) (noting defendant attempted to eliminate paper trail by dealing only in cash, and keeping double set of books with multiple false entries and false documents). Various other indicia of unreported income include paying cash for an automobile or a boat or taking expensive vacations. See *id.* Conti v. Commissioner, 39 F.3d 658, 664 (6th Cir. 1994) (stating that taxpayer's explanations of sources of large amounts of cash were not credible); Steven M. Harris, *Temporary Regulations Clarify Over-\$10,000-Cash Reporting, but Leave Many Questions*, 63 J. TAX'N 138, 141 (1985) (noting that dealings in cash are very incriminating).

229. See United States v. Ludwig, 897 F.2d 875, 877 (7th Cir. 1990) ("Ludwig told Internal Revenue Service Special Agent Lawrence Hart that because he did not trust banks, he kept the \$65,000 to \$75,000 cash proceeds from this bowling alley sale in a box in a closet in his Freedom, Wisconsin, home from 1971 until 1981 when he built the Kaukauna furniture store."); Morris v. United States, 813 F.2d 343, 345-46 (11th Cir. 1987) ("The testimony of K.A. Morris, the appellant, was generally to the effect that he had saved funds during his entire working life, that he did not trust banks, and that he engaged in many 'extra-curricular' activities, such as bee-keeping and buying and selling real estate, and that the profits from such transactions were not banked by him but were secreted around the house.").

D. Failure to Maintain Books and Records

A taxpayer's failure to maintain accurate books and records is allegedly a prime badge of fraud.²³⁰ In fact, this badge should probably be stated as a conscious and deliberate failure to maintain accurate books and records.²³¹

Two situations should be distinguished with regard to this badge. First, when a taxpayer is engaged in an otherwise lawful business, particularly one in which receipts are largely in cash, applying this badge makes sense because the taxpayer presumably has records of his lawful income, and therefore he knows how to keep books and records. Not showing his fraudulent income may be more damning than if he had never kept books. Also any illegal income may possibly be "laundered" by disguising it within records kept for the lawful activities.

In contrast, when an illegal enterprise is not conducted as part of a lawful business, this badge is somewhat less persuasive. Rarely are books kept by most illegal enterprises. In effect, the Service constructs the books the conspiracy should have kept. Of necessity, these must be estimates. An argument is advanced based on the conspiracy's recreated estimated books and records, and the allocation of its income among the conspirators. It is especially unpersuasive when used against marginal conspirators who may know nothing about the conspiracy's overall profits, or how these profits were divided among the other conspirators.²³²

In any case, the absence of books and records is logically as consistent with a taxpayer claiming he received nothing as it is with his sharing in the profits of fraud.

E. Engaging in Illegal Activities

Another recognized badge of fraud is a record of engaging in illegal activities.²³³ "Engaging in illegal activities" presumably refers to illegal activities

230. See I.R.C. § 446 (1999) (requiring each taxpayer use methods of accounting to maintain records that clearly reflect income).

231. See *id.* (specifying federal guidelines regarding accounting practices).

232. See *Cipparone*, 49 T.C.M. at 1494 (stating that Cipparone was not present when illegal income was divided up and he did not exercise control of division of income nor did he see receipts from illegal income).

233. Clearly police officers who obtain warrants not based on probable cause, and their supervisors who know, or should have known, of these acts, and acquiesced in them have committed crimes, even if all of the suspects were in fact guilty. See, e.g., *Rodriguez v. Furtado*, 950 F.2d 805, 813 (1st Cir. 1991) (illustrating situation in which claim was brought against supervising officer and city for failing to supervise adequately detectives in obtaining search warrants). See also Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82-83 (1992) (citing study indicating that police dishonesty does occur in investigative process due to police creating artificial probable cause). One can argue, though, that these types of non-monetary crimes are not indicative of a tendency to commit monetary crimes.

different from the conspiracy in question; otherwise, the same acts would be counted twice.²³⁴ Thus, RICO convictions based on predicate acts which do not require the receipt of money or property can be used against the taxpayer as if the predicate acts did require such receipt.²³⁵

F. Attempting to Conceal Illegal Activity

A person may participate in a conspiracy of silence without profiting from the underlying conspiracy.²³⁶ One who knew, or should have known, of the existence of the illegal acts of others may well participate in the conspiracy through his silence in helping to conceal the underlying conspiracy from the authorities.²³⁷ Such a conspirator does not necessarily profit in monetary terms from the underlying conspiracy; thus, the application of this badge of fraud may

234. See *Sundel v. Commissioner*, 75 T.C.M. (CCH) 1853, 1860 (1998) (badges of fraud in connection with taxpayer's unreported income from drug smuggling; to constitute willful fraud motive for failure to report as income need not be primary motive).

235. See, e.g., *Ryan v. Commissioner*, 75 T.C.M. (CCH) 1778, 1798 (1998) (stating that although crimes such as conspiracy, aiding and abetting bribery, and aiding and abetting robbery do not necessarily involve receipt of money; the court found that these convictions can be considered as factors in determining fraud on all of the facts).

236. See *Vasquez v. Hernandez*, 60 F.3d 325, 327-28 (7th Cir. 1995) (assessing effect of defendant police officers' conspiracy of silence on plaintiff's right to judicial relief). The plaintiff, while in her home, was shot in the ear by a stray bullet from an off-duty officer's gun. See *id.* at 326 (stating that off-duty officers had been charged with violating Cicero Code of Ordinances by using and carrying firearms while off-duty). The plaintiff alleged that there was a conspiracy of silence because another officer, who was not involved in the actual shooting, failed to submit the bullet to the property clerk. See *id.* at 328 (illustrating situation in which person may be part of conspiracy by helping to conceal it without actually profiting in monetary terms from that conspiracy). The lower court held that there was sufficient information to find a conspiracy of silence, and this ruling was affirmed by the Seventh Circuit. See *Vasquez v. Hernandez*, No. 91 C 4088, 1994 WL 201092, at * 11 (N.D. Ill. May 18, 1994), *aff'd*, 60 F.3d 325, 329 (7th Cir. 1995) (civil rights action under 42 U.S.C. § 1983 acknowledging "deplorable nature" of defendants' conduct but the delay caused by defendants' "alleged conspiracy failed to deprive the Vasquezes of their right to access [to the state courts]").

237. See *Deere & Co. v. Zahm*, 837 F. Supp. 346, 351-52 (D. Kan. 1993) ("The court finds that the allegation of silence of the defendants accompanied by an alleged tacit agreement that the silence perpetuate a fraudulent scheme states a cause of action for civil conspiracy."); Howard B. Klein, *Fighting Corruption in the Philadelphia Police Department: The Death Knell of the 'Conspiracy of Silence'*, 60 TEMP. L.Q. 103, 107-08 (1987) (describing conspiracy of silence to shield fellow officers in Philadelphia police department from prosecution and stating that conspiracy probably arose from social pressures within police department, such as being labeled "traitor," being ostracized by other officers or being subject to professional or social retaliation). This article focused on corruption of units of the Philadelphia Police Department other than the unit involved in *Ryan*.

not prove an intent to evade taxation.²³⁸ For example, a marginal conspirator's silence could have been based, not on monetary rewards, but on such things as fear of retaliation by the other conspirators.²³⁹

G. Failure to Cooperate with Tax Authorities

Failure to cooperate with authorities is often considered a badge of fraud. A defendant's denial of any receipt of income is an example of conduct that may be treated by the Service as a "lack of cooperation."²⁴⁰ Indeed, any admission of illegal income less than the amount asserted by the Service could be deemed a lack of cooperation.²⁴¹

In the tax fraud context, this particular badge has certain flaws. For example, when a conspiracy is connected with a regular lawful business, and the records of the business were not produced, such lack of cooperation in not supplying

238. See *Cipparone v. Commissioner*, 49 T.C.M. (CCH) 1492, 1498-99 (1985) (finding that because Cipparone did not receive substantial amounts of income from kickback scheme, his failure to report such income was not evidence of fraud; rather, court found Cipparone lacked specific intent to avoid tax liability).

239. See *White-Ruiz v. City of New York*, No. 93 CIV.7233, 1996 WL 603983, at *3 (S.D.N.Y. Oct. 22, 1996) (citing Mollen Commission report finding that "code of silence" exists in New York City's police force, where "even honest officers are expected to protect corrupt colleagues from detection and punishment."); Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 251-54 (1998). The authors indicate that this code consists of unwritten rules developed due to strong loyalty among fellow officers resulting from "the closed nature of the culture, the resentment of police by the public, the dangers and volatility of police work, and officers' dependence upon one another for mutual safety." *Id.* at 252.

240. See *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952) ("The language of § 145(b) [the present I.R.C. § 7201] which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income" even though the statute of limitations for the crime of lying to a federal official under 18 U.S.C. § 1001 (1994) had run.); *Black v. Commissioner*, 53 T.C.M. (CCH) 679, 680-81 (1987) (finding petitioner's lack of cooperation with government, evidenced by acts such as failing to report taxable income, denying awareness and participation in kickback scheme and continuing to deny receipt of illegal income to government agents, was demonstration of petitioner's fraudulent intent). Query: Is the failure to report income that a petitioner contends he never received considered a lack of cooperation per se?

241. See *Klein v. Commissioner*, 48 T.C.M. (CCH) 651, 657 (1984) (stating that incomplete or misleading statements made during interviews by tax agent could be considered evidence of lack of cooperation; there was prior criminal fraud convictions for some years, and badges of fraud analysis did not prove fraud for other years); see also *Jerome v. Commissioner*, 65 T.C.M. (CCH) 2269, 2271-72 (1993) (stating that petitioner, a tax resister, did not cooperate with tax agents as evidenced by presenting frivolous arguments, failing to respond to summonses for information and failing to make any required estimated tax payments).

accurate records may well be a clear badge of fraud.²⁴² Yet lack of cooperation can also be cited as a badge of fraud if a taxpayer does not confess to most every dollar alleged against him.²⁴³ In large part, this is exacerbated by the protective position's overly large assertions of the taxpayer's unreported income.

If a marginal participant on the periphery of the conspiracy claims that he knows little or nothing, this may not in itself constitute a lack of cooperation. Such a marginal member of the conspiracy may in fact have no information concerning the details of the conspiracy. Even if a marginal conspirator is in fact without knowledge of how the primary conspirators shared the proceeds of the conspiracy, the Service may doubt the marginal conspirator's ignorance and ascribe a lack of cooperation to him. Nevertheless, this can be grounds for the Service to assert that the taxpayer has not cooperated. Quite conceivably, a marginal conspirator whose underlying criminal acts do not require the receipt of money and who denies the receipt of money, and against whom there is nominal evidence of his receipt of money, may fit within this badge of fraud, even if the conspirator never received any money.²⁴⁴

Realistically, is it reasonable to assume that a taxpayer who received very little, if any, income and who receives a Statutory Notice asserting that he has received large unreported receipts as augmented by the "protective position," will

242. See *Webster v. Commissioner*, 63 T.C.M. (CCH) 2757, 2759 (1992) (presuming intent to conceal based on fact that taxpayer kept no records of his unreported income from his illegal gambling activities); *Steines v. Commissioner*, 63 T.C.M. (CCH) 1771, 1775 (1992) (finding that failure to maintain or submit records of deductions and income-producing activities, as well as failing to comply with the rules of court, were evidence of fraud); *Nachison v. Commissioner*, 41 T.C.M. (CCH) 1079, 1083-84 (1981) (stating that refusal to answer request for admissions is deemed to admit those facts and that refusal to provide records in order to delay and frustrate investigation of tax liability was additional indicia of fraud).

243. See *Ryan v. Commissioner*, 75 T.C.M. (CCH) 1778 (1998). (Service alleged that Giongo had additional gross income of \$ 214,900, and he therefore owed \$ 102,331 in additional tax (plus additions) from the RICO enterprise, including allocations under protective position). After trial, on brief the Service dropped its protective position, and said Giongo had unreported income of \$25,966. See *id.* at 1787. He was determined to have received \$ 7150 of fraudulent income from the conspiracy. See *id.* For a further discussion of lack of cooperation, see *supra* note 241 and accompanying text.

With such a disparity between the original amount asserted, and the ultimate sum determined by the court, there is very little room for "cooperation" before trial.

244. See *Ryan*, 75 T.C.M. at 1798 (noting that one taxpayer (Giongo) who had been convicted under RICO only of conspiracy and aiding and abetting was not estopped to deny receiving any money; but stating that although he was not collaterally estopped to deny receipt of money, the court found that as matter of fact, he did receive income from the conspiracy). Although the court held that collateral estoppel did not apply to this situation, in view of these specific findings of receipt of money, such a determination was not necessary. See *id.* at 1797-98 (finding that underpayment of tax was established by clear and convincing evidence and that this deficiency was due to fraud because of his convictions for racketeering and filing of false return).

cooperate with the authorities by admitting to any amount close to that sum?²⁴⁵

An extreme illustration of how the Service views a lack of cooperation occurred when a taxpayer's assertion of his Sixth Amendment right to counsel after being informed by a special agent that he was the subject of a criminal investigation was deemed by the Service to be a lack of cooperation.²⁴⁶ Is a confession the only form of cooperation the Service recognizes?

H. Showing a Willingness to Defraud Business Associates or Others

This badge is presumably based on a taxpayer's supposed predisposition to commit fraud.²⁴⁷ The reasoning behind this badge is that a petitioner who cheats others is likely to cheat the Service.²⁴⁸ This badge should fail, however, if the Service does not prove that the defendant actually committed fraudulent monetary acts, either against other members of the conspiracy by taking an "unfair" share of the spoils, or against third parties.²⁴⁹ It should not be a badge of fraud against one who is only part of a "cover-up conspiracy of silence" of the underlying conspiracy.

I. The Taxpayer's Sophistication, Educational Level, and Knowledge of Duty to Report Income

In effect, this badge helps the Service to prove the "willful" element in tax evasion.²⁵⁰ It entails looking at the particular conspirator and determining

245. For an example of the disparity in the amount the Service alleged was received and the amount that the taxpayer was found to have actually received, see *supra* note 243.

246. See *Klein v. Commissioner*, 48 T.C.M. (CCH) 651, 657 (1984) in which the court, based on the Sixth Amendment, curtly dismissed the Service's contention that a taxpayer who hired a criminal lawyer after a special agent informed him of a criminal investigation was a badge of fraud as a failure of cooperation. Cf. *Dellacroce v. Commissioner*, 83 T.C. 269, 283-86 (1984) (Service contended that taxpayer's invocation of his Fifth Amendment rights was a failure of cooperation; court held that invocation of his Fifth Amendment rights presented a fact issue that could be used to show guilt, as in a criminal case).

247. See *Solomon v. Commissioner*, 732 F.2d 1459, 1462 (6th Cir. 1984) (stating that "taxpayer's willingness to defraud another in a business transaction may point towards willingness to defraud the Government also.").

248. See *id.*

249. If the Service treated one's willingness to share in the money that he is alleged to have stolen as an intent to defraud, the Service is clearly double counting because it presupposes the sharing of the theft proceeds and the cover up, and it therefore duplicates other badges.

250. See *Sommers v. Internal Revenue Serv.*, 209 B.R. 471, 480 (N.D. Ill. 1997) (bankruptcy case; finding defendant's business background to discredit argument that he was "an innocent pawn" in tax evasion scheme); *Berkery v. Commissioner*, 192 B.R. 835, 842 (E.D. Pa. 1996) ("Such sophistication and intelligence, the bankruptcy court submits, is indicative of appellant's clear intent to file a fraudulent return and consequently, evade a tax due."); *Stephenson v. Commissioner*, 79 T.C. 995, 1006 (1982) (citing fact that petitioner was well educated to prove willful element of fraud).

whether his educational level and sophistication make it likely that he would know of the duty to report the illegal income as taxable.²⁵¹

This badge really posits a negative: can a person be deemed not to know of his duty to report any illegal income he has received, even if that income was minimal and illegal? The Service apparently feels that almost everyone should know of the obligation to report all income received, whether illegal or not. As the Tax Court found in *Cipparone*, however, even an honest, ordinary citizen might not know of the duty to include small amounts of illegal income in gross income.²⁵²

In 1946, the Supreme Court determined that embezzled income was not includable in the embezzler's gross income.²⁵³ Fifteen years later, the Court reversed itself, holding that embezzled funds are includable in income.²⁵⁴ If the

251. See *Sommers*, 209 B.R. at 471 n.28 ("It is hard to accept the proposition that someone who could bring a company [a gross profit in excess of \$2.4 million] would be so lacking in sophistication as not to have questioned and understood the transactions [underlying the charge of tax evasion]."); see also *Berkery*, 192 B.R. at 842 (discussing appellant's sophistication). In *Berkery*, the appellant, who was accused of tax evasion, was a college graduate and had been active in real estate speculations among several other businesses. See *id.* at note 10. Also, the appellant successfully defended himself in a criminal conviction. See *id.* The court held that there was sufficient proof to support a finding that appellant's evasion of taxes was "willful." *Id.* at 842. See also *Stephenson*, 79 T.C. at 1006 (stating that "[i]t is hard to believe any individual, much less one as well educated as petitioner, could honestly believe that he could escape liability for income taxation").

252. See *Cipparone v. Commissioner*, 49 T.C.M. (CCH) 1492, 1500 (1985) (stating "[p]etitioner was not very knowledgeable nor sophisticated with respect to tax laws, and it is therefore highly unlikely that he would have appreciated the legal requirement of reporting the 'deemed' partnership income that we have concluded he is liable for.").

253. See *Commissioner v. Wilcox*, 327 U.S. 404, 408 (1946) (stating that embezzled income is not taxable income because taxpayer is obligated to return or repay money). In *Wilcox*, a taxpayer had been convicted of embezzling over \$12,000 from his employer. See *id.* at 406 ("The taxpayer was convicted in a Nevada state court in 1942 for the crime of embezzlement."). The Commissioner "determined that the taxpayer was required to report" the embezzled money as income and pay tax on this amount. See *id.* at 407 (stating Commissioner's position: "[a]s against all the world except the true owner the embezzler is the legal owner, at least while he remains in possession."). The Supreme Court, however, held that the taxpayer did not owe taxes on the embezzled income because he was under an obligation to repay the money to his employer. See *id.* at 408 (stating that embezzled income is not taxable income because it does not bear "essential characteristics of a gain or profit" within the meaning of tax code).

254. See *James v. United States*, 366 U.S. 213, 221 (1961) (stating that "*Wilcox* was wrongly decided"). Prior to *James*, the Court decided that extorted money, unlike the embezzled money in *Wilcox*, was taxable income. See *Rutkin v. United States*, 343 U.S. 130, 138 (1952) ("We do not reach in this case the factual situation involved in *Commissioner of Internal Revenue v. Wilcox*."). (citation omitted). The differing results in *Wilcox* and *Rutkin* caused trouble for the lower courts. See, e.g., *Macias v. Commissioner*, 255 F.2d 23, 26 (7th Cir. 1958) ("In our view, the Court in *Rutkin* repudiated its holding in *Wilcox*; certainly, it repudiated the reasoning by which the result

Supreme Court, at one time, felt that at least some illegal income is not taxable, should an ordinary unsophisticated citizen be held to a higher standard? If everyone knows of a duty to pay tax, does it necessarily follow that everyone knows of a duty to pay tax on small amounts of illegal income?²⁵⁵

In a much different context, but where knowledge and sophistication of a taxpayer are also very relevant, is the qualification of a taxpayer as an "innocent spouse."²⁵⁶ In a somewhat surprising case, the Fifth Circuit held that an *attorney*, who had graduated from two prestigious universities, was an innocent spouse because she had little knowledge of tax law.²⁵⁷

J. Giving Implausible Explanations

Is it implausible that a convicted conspirator received no money?²⁵⁸ The probable response would be that the conspirator "must have" received something of monetary value for his participation.²⁵⁹ But this is only an inference; it is not

was reached in that case."); *United States v. Bruswitz*, 219 F.2d 59, 61 (2d Cir. 1955) ("It is difficult to perceive what, if anything, is left of the *Wilcox* holding after *Rutkin* . . ."); *Marienfeld v. United States*, 214 F.2d 632, 636 (8th Cir. 1954) ("We find it difficult to reconcile the *Wilcox* case with the later opinion of the Supreme Court in *Rutkin* . . .").

255. See *Cipparone*, 49 T.C.M. 1492.

256. *Reser v. Commissioner*, 112 F.3d 1258, 1262-63 (5th Cir. 1997) (citing I.R.C. §6013(e)). The court explained:

[T]o assert the innocent spouse defense successfully, a spouse must establish that (1) a joint return was made for the taxable year; (2) on that return there is a substantial understatement of tax attributable to grossly erroneous items of the other spouse; (3) in signing the return, the spouse did not know, and had no reason to know, of such substantial understatement; and, (4) taking into account all the facts and circumstances, it would be inequitable to hold the spouse liable for the deficiency.

Id.

257. See *Reser*, 112 F.3d at 1260 (finding wife eligible for "innocent spouse" status though she was "a personal injury defense lawyer who obtained an undergraduate degree in history from Stanford University and a law degree from the University of Texas"). Although the court stated that "a spouse's level of education" is one factor in determining that spouse's "reason to know" of the fraudulent tax return, the court did not conclude that this particular spouse's legal background should have made a difference here because the illegal deductions on her husband's tax return looked legitimate. *Id.* at 1267-69. "Had Reser asked [her husband or any of his business associates] about the deductions, they would have told her what they believed—that [the company's] losses were properly deductible in full." *Id.* at 1269.

258. See *Conti v. Commissioner*, 39 F.3d 658, 661-62 (6th Cir. 1994) (stating that taxpayer's explanations of sources of large amounts of cash were unbelievable); *Niedringhaus v. Commissioner*, 99 T.C. 202, 211 (1992) (listing "implausible or inconsistent explanations of behavior" among factors of circumstantial evidence that may support finding of fraudulent intent).

259. See *Cipparone*, 49 T.C.M. at 1496 (noting "*Keogh* [34 T.C.M. (CCH) 844 (1975)] supports petitioner's position that the amount of money received is not 'essential' to a bribery or conspiracy conviction").

proof. Although such inferences may usually be correct, it is certainly possible for one to be a conspirator in the cover up for non-financial reasons without participating financially in the underlying conspiracy.²⁶⁰ In practice, however, if the story varies from the Service's assertions, it may be deemed to be implausible, rather than simply unlikely.²⁶¹

K. Summary of Badges of Fraud in Civil Fraud Cases

The difficulty with a "badges of fraud" approach in a civil tax fraud case is that some of the badges alleged against a taxpayer may have quite plausible, non-fraudulent explanations. The Service can assert, as an indicia of fraud, every badge of fraud against a taxpayer that could possibly be true. Of course, the Service will not assert any countervailing factors. Case law suggests that when the Service suspects that a taxpayer's acts are fraudulent, the evidence constituting a badge of fraud can be marshaled against the taxpayer.²⁶² One may suspect that these badges, as applied by the Service, seem to be based on a notion that because the taxpayer is a convicted felon, he is not worthy of any positive interpretation of his record.

Once the Service has proven fraud by collaterally estopping the taxpayer from relitigating the issues determined in a prior trial, or by a badges of fraud approach, the taxpayer must then bear the burden of disproving the income ascribed to him by the Statutory Notice.²⁶³

CONCLUSION

There is no reason for the Service to be so secretive about the way it performs its mandated duties to determine a taxpayer's true income tax. The Service's expansive use of *Greenberg's Express*, its position that there need not

260. See *supra* notes 237-38 and accompanying text.

261. See *Bahoric v. Commissioner*, 363 F.2d 151, 153 (9th Cir. 1966) (stating that taxpayer's testimony regarding his income was not plausible). In *Bahoric*, taxpayer allegedly understated the income from his dry cleaning business by over \$400,000. See *id.* at 152-53. The taxpayer first explained the understatement by stating that \$50,000 of the alleged understatement was not income, but rather money he had previously left in his sister's safekeeping and later retrieved. See *id.* at 153. Next, the taxpayer claimed he was simply too ignorant to report his income properly. See *id.* at 154. The court, however, found both arguments implausible. See *id.* at 153 (stating "the ridiculousness of such an alibi in the situation here could very properly entitle a trier of the facts to conclude that cheating on his income tax was [taxpayer's] motivation over the years"); see also *Van Heemst v. Commissioner*, 72 T.C.M. 26, 31 (1996) (calling taxpayer's rendition of facts implausible because he had given "conflicting stories").

262. See, e.g., *Klein v. Commissioner*, 48 T.C.M. (CCH) 651, 654 (1984) (mentally disturbed taxpayer blamed understatements on various non fraudulent circumstances and court found no fraud for some years and fraudulent for years in which he had been found guilty of criminal fraud; in addition, collateral estoppel is not affected by fact that new witnesses arguably could have affected result in prior criminal case).

263. See I.R.C. § 6663(b) (1999); see also *supra* note 25.

be a considered "determination" of a deficiency, and its broad assertions of privilege combine to create the appearance and possibly the fact of unfairness in taxation. What is needed is an openness of the Service and its employees to assure the public that its procedures have produced fair and proper results.

The Service has immense power to assess and collect taxes and to interfere in the life of taxpayers. Recent congressional hearings and resulting statutory amendments have dealt with some excesses of the Service. But the issue of the accuracy of the Statutory Notice does not generate much interest. However, it is part of the overall picture of the Service's position that its internal workings are not subject to review.

As noted in Parts II and III of this Article, the full range of discovery that is available under the Tax Court's rules should be available to discover all relevant information the Service possesses, provided that such information would be admissible at trial and is not privileged under *Peterson*.

The ministerial acts of the revenue agent in determining the amount of a deficiency need not be protected if the agent made significant errors. Therefore, at least the work papers showing how the agent calculated the asserted deficiency must be made available to the petitioner.²⁶⁴ Furthermore, that agent should be required to testify if he is called to explain the documents.²⁶⁵ If the revenue agent's work is proper, the Service has nothing to fear. If the worksheets and the testimony explaining those documents are markedly inaccurate, the Service should lose its presumption of correctness. In reality, adopting this position might cause revenue agents and their supervisors to be more careful in the future.²⁶⁶

The Service can use testimony and other evidence to determine the total income of the illegal conspiracy with reasonable accuracy. However, as the Service argues, because only the conspirators themselves can know how that total income was divided, the protective position is the only way to protect the revenue. Ascribing all or almost all of that income to a conspirator on the periphery of the conspiracy, who may have received little, if any, of the income, places an unfair burden on that peripheral taxpayer. The protective position may be necessary when the Statutory Notices are issued, but the Service should end its multiple redundant assertions of income in order to state its true figures of income to each conspirator as soon as possible. In many situations that would be

264. See, e.g., *Branerton Corp. v. Commissioner*, 64 T.C. 191, 198-99 (1975) (finding work papers of revenue agent, including revenue agent reports and related audit workpapers, two district conferee reports, memoranda and appellate conferee report, were not prepared in anticipation of litigation because they were prepared by non-attorney, and therefore rejecting respondent's contention that they constitute nondiscoverable work product).

265. Examination of the revenue agent concerning how he determined the amounts of unreported income on the Statutory Notices was allowed in *Ryan*, over the objection of the Service. Transcript, *supra* note 73, at 2285-87.

266. Congressional hearings in 1997 showing abuses by the Service led to passage of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, which began attempts to make the Service more "user-friendly."

after the Service has presented its case-in-chief, at which point all of the evidence against the conspirators will have been presented.²⁶⁷

Any allocation of the total income of a conspiracy must take into account the fact that some may have been major participants, while others were only minor participants. In other words, a minor conspirator should not be allocated the same sum as a major conspirator. The status of a minor conspirator, if not obvious from the start, will be quite clear at the end of the Service's case-in-chief.

Using *Greenberg's Express*, privilege, and *Scar*, the Service combines with the Tax Court to keep the taxpayer from obtaining information about how the Service made its determination of the taxpayer's deficiency. This is unfair. All taxpayers, including convicted felons, are entitled to fairness in taxation.

267. In *Ryan*, the Service reduced its dollar assertions after trial.

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NOTES

JUSTIFICATIONS FOR STATE BYSTANDER INTERVENTION STATUTES: WHY CRIME WITNESSES SHOULD BE REQUIRED TO CALL FOR HELP

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INTRODUCTION

In the series finale of the television show *Seinfeld*, Jerry, Elaine, George, and Kramer served time in prison for violating Massachusetts' new Duty to Assist Statute. The fictional foursome had not only stood by passively and watched the mugging of a stranger, but also found the crime amusing. *Seinfeld* saw humor in a tragic situation.

The need for a statute creating a duty to report a crime or assist a crime victim enters into the debate through highly publicized tales of failure to render assistance. The first high profile incident of a failure to intervene occurred in 1964. On March 13, 1964, twenty-eight-year-old Catherine "Kitty" Genovese was stabbed to death outside of her Queens, New York apartment at three in the morning.¹ Thirty-eight of Ms. Genovese's neighbors witnessed the attack, but none called the police or intervened to stop the criminal. Ms. Genovese's assailant left her at one point when a neighbor yelled out of his window, but he later returned to continue his attack. Only one neighbor stepped forward to call the police, though even he waited to seek advice from a friend. By the time the police arrived at the scene, it was too late. Ms. Genovese had died.²

In 1983, six patrons of a New Bedford, Massachusetts tavern raped a twenty-two-year-old woman while the other customers cheered. No one intervened or called the police. The victim received help only when she escaped, ran into the street and hailed a passing truck.³

More recently, in May 1997, seven-year-old Sherrice Iverson was sexually assaulted and strangled to death in the women's restroom of a Primm, Nevada

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1. See A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES 30 (1964).

2. See *id.* at 30.

3. See Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 21 (1993). This attack served as the basis for the 1988 film *The Accused*. THE ACCUSED (Paramount Pictures 1988).

hotel and casino.⁴ Sherrice's murderer was eighteen year-old Jeremy Strohmeyer. Jeremy's best friend, David Cash, followed Jeremy into the women's restroom, peered over the toilet stall and witnessed Jeremy in the stall with Sherrice. David tapped Jeremy on the head, but Jeremy did not stop his attack on Sherrice. David then left the restroom and waited outside⁵ without attempting to alert security guards to physically intervene to aid Sherrice. When Jeremy emerged, he confessed to molesting and killing Sherrice. After hearing the confession, David's only response was to ask whether the girl had been aroused.⁶ The two young men then left the casino and played video games at a nearby arcade. As a result of David's failure to intervene, Sherrice Iverson's mother and others are advocating a law requiring witnesses to intervene and report cases of sexual assault against children. They have vowed to take their case to the federal level.⁷

This Note, in part, addresses whether a statute, either state or federal, should impose upon a crime witness both the duty to intervene⁸ and criminal liability for failure to do so. Part I provides background on the legal duty to assist another and existing legislation in the area. Part II discusses sociological/societal and psychological justifications for an affirmative duty statute that would require intervention on behalf of the victim of a crime. Part III proposes a statute requiring intervention on behalf of the victim and considers possible penalties for the violation of such a statute. Part IV examines the federalization of such a statute and concludes that, while states are justified in enacting intervention statutes, the federal government does not have the power to pass such legislation.

I. BACKGROUND

A. History

Traditionally, American law has not imposed liability, either civil or criminal, for the failure to render assistance or rescue, absent a specific legal duty to do so.⁹ Instead, within the law of torts, a distinction has generally been made

4. See Cathy Booth, *The Bad Samaritan*, TIME, Sept. 7, 1998, at 59.

5. See *id.*

6. See *id.* Jeremy Strohmeyer pled guilty to avoid the death penalty. Jeremy's attorney proposed that David should be punished for not stopping Jeremy. See *id.* The duty proposed by this Note would not provide a means of reducing the guilt or culpability of the assailant. Rather, it would serve to assist the victims of crime.

7. See *id.*

8. Intervention may mean reporting or providing direct assistance. See Robert F. Kidd, 'Impulsive' Bystanders: Why Do They Intervene, in REACTIONS TO CRIME: THE PUBLIC, THE POLICE, COURTS, AND PRISONS 20, 23-24 (David P. Farrington & John Gunn eds., 1985).

9. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 56 (5th ed. 1984). Because of this reluctance to countenance "nonfeasance" as a basis of liability, the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is

between “misfeasance” (active misconduct), and “nonfeasance” (passive inaction).¹⁰ In order for liability to be imposed, the law has typically required active rather than passive conduct. Thus the law has created restraints on affirmative acts of harm while avoiding turning the courts into a means of forcing people to help each other.¹¹

Affirmative duties and subsequent liability for omissions, however, are imposed upon persons standing in certain personal relationships to others.¹² Within the law of torts, a specific relationship is required for the imposition of liability for a failure to act.¹³ Criminal liability for omissions may also be imposed when the parties involved stand in personal relationships with each other.¹⁴ For example, parents are under a duty to aid their children; a spouse is under a duty to aid his or her spouse; ship captains are under a duty to aid their crews; and masters are under a duty to aid their servants.¹⁵ These relational duties are similar to those required in the law of torts. Thus, while criminal liability will not usually be imposed upon a bystander who fails to summon the authorities for a stranger, a parent may be held criminally liable for failing to summon the authorities to assist his or her child.

In addition to duties created by special relationships, many other situations also give rise to an affirmative duty. Often, an affirmative duty may be created by statute. Examples include a duty to help another in distress, a duty to provide safety measures, and a duty to provide necessities.¹⁶ In addition, an affirmative duty may also arise out of a contract. Failure to act according to the contract may result in criminal liability even if the victim is not one of the contracting parties.¹⁷

in danger of losing his life.

Id. at 375. “Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself.” WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 3.3, at 203 (2d ed. 1986).

10. KEETON ET AL., *supra* note 9, at 373.

11. *See id.*

12. *See id.* at 376.

13. “[D]ifficulties of setting any standards . . . ha[ve] limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty. . . .” *Id.*

14. *See* LAFAVE & SCOTT, *supra* note 9.

15. *See id.*

16. *See, e.g.,* IND. CODE § 35-46-1-4 (1998) (neglect of a dependent; child selling); KAN. STAT. ANN. § 21-3605 (1995) (non-support of a child or spouse); KAN. STAT. ANN. § 21-3608 (1995) (endangering a child); N.Y. PENAL LAW § 260.05 (McKinney 1989) (non-support of a child); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.07, at 82 (1987); *infra* Part I.B (discussing statutes imposing a duty to rescue).

17. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 54, at 663 (3d ed. 1982). For example, where a mother enters into a contractual relationship with a babysitter to watch her children, the babysitter could face liability for failing to assist one of the children even though the child was not a party to the contract. *See* DRESSLER, *supra* note 16, at 83; LAFAVE & SCOTT, *supra* note 9, at 205.

Further, once someone undertakes to rescue another, a duty is subsequently imposed to complete the rescue.¹⁸ When a party creates a danger, he or she is under a duty to safeguard others against that danger.¹⁹ A duty to act also exists where a party is under a duty to control the conduct of others.²⁰ Finally, landowners may be under a duty to provide for the safety of those "present on their property."²¹

B. Current Legislation

While in common law no general duty to rescue existed, many states have now enacted affirmative duty statutes in response to outrageous crimes and the failure of witnesses to intervene. These affirmative duty statutes require a bystander to intervene to assist a crime victim or impose criminal liability for the failure to do so. These statutes require either the rescue of one in peril in the absence of danger or the immediate reporting of crimes to the authorities.

Four states have each enacted statutes requiring rescue by a bystander when no danger is imminent: Minnesota,²² Rhode Island,²³ Vermont,²⁴ and

18. See DRESSLER, *supra* note 16, at 83.

19. See *id.*

20. See LAFAYE & SCOTT, *supra* note 9, at 206.

21. *Id.*

22. See MINN. STAT. ANN. § 604A.01(1) (West Supp. 1999).

Duty to assist.

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

Id.

23. See R.I. GEN. LAWS § 11-56-1 (1994).

Duty to assist.

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months or by a fine of not more than five hundred dollars (\$500), or both.

Id.

24. See VT. STAT. ANN. tit. 12, § 519 (1973).

Emergency medical care

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others. . . .

Wisconsin.²⁵ Minnesota enacted its statute in response to the gang rape in New Bedford, Massachusetts.²⁶

Colorado,²⁷ Florida,²⁸ Hawaii,²⁹ Massachusetts,³⁰ Nevada,³¹ Ohio,³² Rhode Island,³³ and Washington³⁴ have each enacted statutes requiring witnesses to report the crimes they witnessed to the authorities. These state statutes that create a duty to report crime appear to fall within two distinct types: those that require the reporting of certain, specifically enumerated crimes and those that require reporting of all general criminal acts. Massachusetts,³⁵ Rhode Island,³⁶

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.

Id.

25. See WIS. STAT. ANN. § 940.34 (West 1996).

Duty to aid victim or report crime.

(1)(a) Whoever violates sub. (2)(a) is guilty of a Class C misdemeanor . . .

(2)(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.

Id.

26. See *supra* note 3 and accompanying text. "[T]he 'bill's sponsor . . . said he was moved to introduce the bill by reports of the gang rape earlier this year of a woman in a New Bedford, Mass., barroom who was hoisted onto a pool table and repeatedly assaulted while spectators stood by and some shouted 'go for it!'" LAFAVE & SCOTT, *supra* note 9, at 212 n.70 (quoting NAT'L L.J., Aug. 22, 1983, at 5).

27. See COLO. REV. STAT. ANN. § 18-8-115 (West 1999).

28. See FLA. STAT. ANN. § 794.027 (West 1992).

29. See HAW. REV. STAT. ANN. § 663-1.6(a) (Michie 1995).

30. See MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990).

31. See NEV. REV. STAT. ANN. § 202.882 (Michie 1999).

32. See OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

33. See R.I. GEN. LAWS §§ 11-1-5.1; 11-37-3.1 (1994).

34. See WASH. REV. CODE ANN. § 9A.06.010 (West 1998).

35. See MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990).

Reports of crimes to law enforcement officials

Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

Id.

36. See R.I. GEN. LAWS § 11-1-5.1 (1994).

Reports of crimes to law enforcement officials.

A person who knows that another person is a victim of sexual assault, murder, manslaughter, or armed robbery and who is at the scene of the crime shall, to the extent that the person can do so without danger of peril to the person or others, report the

Washington,³⁷ and Florida³⁸ fall into the first class of statutes, while Colorado,³⁹

crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates the provisions of this section shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000).

Id.

R.I. GEN. LAWS § 11-37-3.1 (1994) states:

Duty to report sexual assault.

Any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence shall immediately notify the state police or the police department of the city or town in which the assault or attempted assault is taking place of the crime.

Id.

37. See WASH. REV. CODE ANN. § 9.69.100 (West 1998).

Duty of witness of offense against child or any violent offense—Penalty

(1) A person who witnesses the actual commission of:

(a) A violent offense as defined in RCW 9.94A.030 or preparations for the commission of such an offense;

(b) A sexual offense against a child or an attempt to commit such a sexual offense; or

(c) An assault of a child that appears reasonably likely to cause substantial bodily harm to the child, shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials. . . .

(4) Failure to report as required by subsection (1) of this section is a gross misdemeanor. However, a person is not required to report under this section where that person has a reasonable belief that making such a report would place that person or another family or household member in danger of immediate physical harm.

Id.

38. See FLA. STAT. ANN. § 794.027 (West 1992).

Duty to report sexual battery; penalties

A person who observes the commission of the crime of sexual battery and who:

(1) Has reasonable grounds to believe that he or she has observed the commission of a sexual battery;

(2) Has the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer;

(3) Fails to seek such assistance;

(4) Would not be exposed to any threat of physical violence for seeking such assistance;

(5) Is not the husband, wife, parent, grandparent, child, grandchild, brother, or sister of the offender or victim, by consanguinity or affinity; and

(6) Is not the victim of such sexual battery

is guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

Id.

39. See COLO. REV. STAT. ANN. § 18-8-115 (West 1994).

Duty to report a crime—liability for disclosure

It is the duty of every corporation or person who has reasonable grounds to believe that

Hawaii,⁴⁰ Nevada,⁴¹ and Ohio⁴² represent the second.

In January 1998, a bill was introduced into the Mississippi House of Representatives that would have required a person to summon law enforcement officers or other assistance when he or she knew that a victim was being exposed to bodily harm during the commission of a crime.⁴³ However, the bill was not carried over when the regular session ended in May 1998. A bill requiring one to summon assistance when he or she knows that another person has suffered

a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law.

Id.

40. See HAW. REV. STAT. § 663-1.6(1) (Michie 1995).

Duty to Assist

(a) Any person at the scene of a crime who knows that a victim of the crime is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a petty misdemeanor.

Id.

41. See NEV. REV. STAT. ANN. § 202.882 (Michie 1999).

Duty to report violent or sexual offenses against child 12 years of age or younger; penalty for failure to report; contents of report

1. [A] person who knows or has reasonable cause to believe that another has committed a violent or sexual offense against a child who is 12 years of age or younger shall:

(a) Report the commission of the violent or sexual offense against the child to a law enforcement agency; . . .

2. A person who knowingly and willfully violates the provisions of subsection 1 is guilty of a misdemeanor.

Id. The Nevada statute was inspired, in part, by the attack on Sherrice Iverson. See *60 Minutes* (CBS television broadcast, Aug. 29, 1999), available in 1999 WL 16209104.

42. See OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

Reporting Felony; Medical Personnel to Report Gunshot, Stabbing, and Burn Injuries and Suspected Domestic Violence

(A) No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities. . . .

(I) Whoever violates division (A) or (B) of this section is guilty of failure to report a crime. Violation of division (A) of this section is a misdemeanor of the fourth degree.

Id.

43. See H.R. 604, 1998 Reg. Sess. (Miss. 1998).

substantial bodily harm was also introduced in Washington in 1997.⁴⁴ The bill was never codified and was re-introduced on January 22, 1999.⁴⁵

At the federal level, the Misprision of Felony⁴⁶ statute has long been "on the books," although it has seldom been used. The Misprision of Felony statute is likely not to apply in situations of bystander intervention. The statute states that

[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.⁴⁷

"Felony" is a much more technical requirement than knowing that someone is in danger or the victim of crime. A further requirement read into the statute in order to obtain a conviction is an affirmative act of concealment.⁴⁸ In order for the Misprision of Felony statute to serve as a bystander intervention statute, the bystander would have to know that a felony is being committed and engage in some affirmative act of concealment. Therefore, the federal Misprision of Felony statute does not serve the role of a bystander intervention statute.

II. JUSTIFYING BAD SAMARITAN STATUTES

The bystander intervention duty has its origins in biblical tradition. Intervention statutes, such as those discussed above,⁴⁹ are often referred to as "Good Samaritan" statutes based on the parable of the same name. In the "Good Samaritan,"⁵⁰ a man, though he was not obligated to do so, rescues a stranger

44. See Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 416 (1998).

45. See H.R. 1429, 56th Leg., 1st Reg. Sess. (Wash. 1999).

46. 18 U.S.C. § 4 (1994).

47. *Id.*

48. See Jack Wenik, *Forcing Bystanders to Get Involved: Case for Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1792 (1985).

49. See *supra* notes 22-42 and accompanying text.

50. The Christian parable of the Good Samaritan illustrates the moral duty to render assistance to those in need. The parable states:

A man fell victim to robbers as he went down from Jerusalem to Jericho. They stripped and beat him and went off leaving him half-dead. A priest happened to be going down that road, but when he saw him, he passed by on the opposite side. Likewise a Levite came to the place, and when he saw him, he passed by on the opposite side. But a Samaritan traveler who came upon him was moved with compassion at the sight. He approached the victim, poured oil and wine over his wounds and bandaged them. Then he lifted him up on his own animal, took him to an inn and cared for him. The next day he took out two silver coins and gave them to the innkeeper with the instructions, "Take care of him. If you spend more than what I have given you, I shall repay you on my way back."

who had been beaten and left on the side of a road. Unlike the priest and the Levite who passed the stranger by, the Samaritan offered assistance.

Bad Samaritan statutes, however, provide a better description. According to professor and author Joel Feinberg in *Harm to Others*, the Bad Samaritan is:

1. [A] stranger standing in no "special relationship" to the endangered party,
2. [W]ho omits to do something—warn of unperceived peril, undertake rescue, seek aid, notify police, protect against further injury, etc.—for the endangered party,
3. [W]hich he could have done without unreasonable cost or risk to himself or others,
4. [A]s a result of which the other party suffers harm, or an increased degree of harm,
5. [A]nd for these reasons the ommitter is "bad" (morally blameworthy).⁵¹

Tales of outrageous omissions, such as those described above,⁵² indicate the need for "Bad Samaritan" legislation. Aside from existing legislation in a few states, sociological and psychological justifications exist in support of enacting "Bad Samaritan" statutes in the states. Bystander intervention statutes prevent harm and protect public interests by motivating and requiring bystanders to intervene to aid crime victims.

A. Sociological Justifications

Sociological justifications exist for bystander intervention statutes because they serve both current societal requirements and benefit society as a whole. Moral obligation, civic duty, harm prevention, and public interest each provide sociological justifications for bystander intervention legislation.

1. *Moral Justifications*.—"Bad Samaritan" legislation is supported by the moral obligation to render assistance to others. Moral obligation in itself is often criticized as a justification for "Bad Samaritan" statutes based on the belief that such statutes (wrongfully) legislate charity.⁵³ Because other justifications exist for "Bad Samaritan" statutes, it is not necessary that these criticisms be addressed.

However, even if morality served as the only justification, "Bad Samaritan" legislation should not be automatically dismissed. Lord Patrick Devlin of England wrote, "I think it is clear that the criminal law as we know it is based upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else."⁵⁴ He went on to state that "without shared

Luke 10:30-36.

51. JOEL FEINBERG, *HARM TO OTHERS* 126 (1984).

52. See *supra* notes 1-6 and accompanying text.

53. See FEINBERG, *supra* note 51, at 129.

54. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 7 (1975). Examples of such crimes

ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live."⁵⁵ That we share the ideals inherent in the morality of "Bad Samaritan" legislation is evident in the teachings of various world religions.⁵⁶ Legislation in this area "would give legal effect to a moral principle that we are our brother's keeper."⁵⁷

Because the moral principle behind "Bad Samaritan" statutes is shared almost universally by the world's many religions and because laws are often based, to some degree, on moral principle, moral obligation supports enactment of a bystander intervention statute. Creation of such a statute would give legal effect to an already existing shared principle that we should help those in distress.

2. *Civic Duty as a Justification.*—The enactment of "Bad Samaritan" legislation is further supported by existing civic duty. While few jurisdictions have mandated a duty to report crime, a civic duty to assist in the criminal justice system by notifying the police with information concerning crimes is as old as our nation. "For our political system . . . clearly imposes a *civic duty*, a duty of citizenship, to cooperate with law enforcement, even when that duty is not specifically enforced by the criminal or civil law."⁵⁸ Notification is vital to the criminal justice system.⁵⁹

include bans on euthanasia, incest between siblings, and suicide. *See id.*

55. *Id.* at 10.

56. In addition to the Christian parable of the Good Samaritan stated above, a story in the Jewish Talmud states that "whoever saves one life is as though he had saved the whole world." REV. DR. A. COHEN, *EVERYMAN'S TALMUD* 222 (E.P. Dutton & Co. 1949). *See also* B.T. *Sanhedrin* 37(A); Plater Robinson, *Schindler's List Teaching Guide* (June 1995) (visited Aug. 9, 1999) <<http://www.tulane.edu/~so-inst/schind.html>>.

In Buddha's Sermon on Charity:

The charitable man has found the path of salvation. He is like the man who plants a sapling, securing thereby the shade, the flowers, and the fruit in future years. Even so is the result of charity, even so is the joy of him who helps those that are in need of assistance; even so is the great Nirvana.

We reach the immortal path only by continuous acts of kindness and we perfect our souls by compassion and charity.

PAUL CARUS, *THE GOSPEL OF BUDDHA* 76 (1915).

The Hindus believe that God is unselfishness. *See generally* Vivekananda, *VIVEKANANDA: THE YOGAS AND OTHER WORKS* (1953). "Gandhi showed the world that the love of one's people need not be inconsistent with the love of humanity. He strove to free the downtrodden from the shackles of injustice, slavery and deprivation." YOGESH CHADHA, *GANDHI—A LIFE* at vii (John Wiley & Sons 1997).

57. Diane Kiesel, *Who Saw This Happen? States Move to Make Crime Bystanders Responsible*, 69 A.B.A. J. 1208, 1208 (1983) (quoting Arthur Miller).

58. JOEL FEINBERG, *HARMLESS WRONGDOING* 244 (1988).

59. *See* FEINBERG, *supra* note 51, at 171.

The duty proposed by this Note,⁶⁰ bystander intervention by summoning the authorities, would serve the civic duty of assisting law enforcement. By requiring bystanders to notify the authorities, the criminal justice system is able to fulfill its role in aiding the victims of crime and stopping criminal acts. Because all citizens share in the responsibility of maintaining the criminal justice system and because notification is a vitally important factor in its efficient administration, civic duty justifies the enactment of bystander intervention statutes.

3. *Prevent Harm.*—"Bad Samaritan" legislation is further justified because it serves to prevent harm by requiring either a rescue or the immediate reporting of a crime in order to assist the victim. Without any intervention, a crime victim is certain to suffer some type of harm; bystander intervention statutes serve to prevent harm or alleviate this harm in order to create a better result for the victim. Bystander intervention statutes serve to prevent harm to the victim that is connected and causally relevant to the bystander's failure to intervene.

Criminal laws exist, in part, to prevent harm.⁶¹ The law regulates personal freedom by imposing duties and extending liberties. The law also confers rights against one's fellow citizens; it protects citizens by prohibiting one from exercising their personal liberties to the detriment of others.⁶² While a presumption in favor of liberty exists, certain societal interests justify limiting personal liberty.⁶³

The Harm Principle is a common liberty-limiting principle. It holds that penal law is permissible because it is an effective means of preventing harm to people.⁶⁴ A harm is defined as a wrongful setback of interest.⁶⁵ Omissions, under some circumstances, can be the cause of harms.⁶⁶ "Preventing people from causing harm is noncontroversially a legitimate function of criminal law, and prohibiting people from allowing harm has precisely the same point, namely *to prevent harms*."⁶⁷

60. See discussion *infra* Part III.A.

61. See FEINBERG, *supra* note 51, at 131. "[T]he criminal law system is the primary instrumentality for preventing people from intentionally or recklessly harming one another." *Id.*

62. See *id.* at 8.

63. See *id.* at 10.

64. See *id.* at 26.

65. See *id.* at 33.

66. See *supra* Part I.A.

67. FEINBERG, *supra* note 51, at 129. "Both statutes prohibiting persons from causing harm and statutes requiring persons to prevent harm have as their rationales the need to prevent harm, precisely the rationale whose legitimacy is endorsed by the harm principle as initially formulated." *Id.* at 186. "Where minimal effort is required of a [S]amaritan there seems to be no morally significant difference between his allowing an imperiled person to suffer severe harm and his causing that harm by direct action, other things (intention, motive) being the same." *Id.* at 171. The duty to intervene on behalf of the victim proposed by this Note would only be imposed where the harm to be prevented or stopped is extreme and the effort or risk required to prevent it is minimal. The duty would only be imposed when a bystander witnesses specific criminal acts and where the

One argument against "Bad Samaritan" legislation is the distinction between misfeasance and nonfeasance.⁶⁸ However, "Bad Samaritan" legislation is justified as it serves to prevent harm, regardless of misfeasance or nonfeasance. Under the Harm Principle, the distinction between preventing people from causing harm and prohibiting people from allowing harm is irrelevant, because the victim ultimately suffers harm. Regardless of whether there is a bystander witnessing a crime or not, the crime victim suffers harm. The bystander intervention statute proposed by this Note⁶⁹ would require the bystander to intervene by reporting the crime and summoning the authorities. By summoning the authorities, the victim's injury would be mitigated or avoided all together. The police may be able to stop the crime and rescue the victim. Because harm to the crime victim is either mitigated or completely avoided by the enactment of "Bad Samaritan" legislation, it serves the harm principle, thereby providing support for the enactment of "Bad Samaritan" legislation.

"Bad Samaritan" legislation serves to prevent harm. The harms prevented by such statutes are connected to the bystander's failure to intervene.⁷⁰ A bystander who witnesses a crime upon a victim has the power to affect the situation and the crime in progress by notifying the authorities or directly assisting the victim. If the bystander does nothing, the resulting harm to the victim is a consequence of the bystander's decision not to use this power to intervene.

Not only is the harm that results to the victim connected to the bystander's failure to intervene, but the bystander's failure to intervene is also a "causally relevant factor"⁷¹ in the resulting harm to the victim. Failing to summon the authorities on behalf of the victim is not the sole cause for the resulting harm—the bystander is not directly attacking the victim. However, the bystander's failure to summon the authorities or to provide direct assistance plays a relevant role in the harm that results. This causal connection supports the enactment of "Bad Samaritan" legislation. If the bystander intervenes, the victim will not be harmed as severely. If, for example, the victim was assaulted, the bystander's direct intervention or immediate crime reporting may avoid commission of a rape or a murder. This connection indicates that the bystander is a casual factor in the victim's harm if he or she fails to intervene.

Requiring a bystander to intervene, either directly or by summoning the authorities, could reduce or prevent any harm done to the victim. The harm that is avoided is causally connected to the bystander's failure to intervene. Because it prevents harm and therefore serves the Harm Principle, justification exists for enactment of "Bad Samaritan" legislation.

duty may be executed without harm to the bystander. See discussion *infra* Part III.A.

68. See *supra* notes 9-11 and accompanying text.

69. See discussion *infra* Part III.A.

70. "[W]hen one has the power to affect events one way or another depending on one's choice, then the way events are subsequently affected is a consequence of the way that power was exercised." FEINBERG, *supra* note 51, at 174.

71. *Id.* at 175.

4. *Protect Public Interests.*—Related to the Harm Prevention Principle, which protects people from harm, “Bad Samaritan” legislation is further justified because it would protect public interests. A statute imposing the duty to intervene on behalf of crime victims and imposing criminal liability for the failure to do so would serve to deter antisocial behavior. Criminal legislation exists to protect societal interests, including the protection of public harm.⁷² Antisocial behavior can appropriately be made the subject of a criminal statute because it constitutes a public wrong.⁷³

Witnessing a crime and ignoring the plight of the victim is antisocial behavior and therefore a public wrong. A witness to a crime who fails to intervene ignores societal expectations to aid one’s neighbor, despite the absence of a legal duty.⁷⁴ A statute that requires intervention would allow the criminal justice system to punish the failure to intervene. Such a criminal statute would therefore serve to deter antisocial behavior on the part of the witness/bystander.

Moral justifications and existing civic duty serve as societal justifications for “Bad Samaritan” legislation. In addition, such legislation would serve to prevent harm to others and would serve to deter antisocial behavior.

B. *Psychological Justifications*

In addition to sociological justifications, psychological justifications also exist for the enactment of “Bad Samaritan” legislation. Psychological justifications include creating an expectation of intervention, creating a prior personal decision on behalf of the bystander, drawing the bystander to the suffering of the victim, equalizing expectations, and fulfilling the need for personal gratification. Each of these serves to motivate the bystander to intervene and, in doing so, justifies the enactment of “Bad Samaritan” legislation.

1. *Societal Expectation of Intervention.*—“Bad Samaritan” statutes would create a societal expectation of intervention. Individual’s behavior is shaped by social norms. One reason people do not render assistance is that they perceive no societal expectation to do so. Bystanders are acting in accordance with the social norm of no intervention.⁷⁵ David Cash, whose best friend Jeremy Strohmeyer sexually assaulted and murdered Sherrice Iverson in a restroom while David waited outside, repeatedly stated, when criticized for failing to stop his friend, that he did nothing wrong and was under no duty to act otherwise.⁷⁶ Based upon David’s statements one could say that he felt no societal expectation to intervene. A statute requiring some form of intervention would change the legal duty from no obligation to assist to a duty of intervention. Laws emphasize

72. See *id.* at 11.

73. See Anthony D’Amato, *The “Bad Samaritan” Paradigm*, 70 NW. U. L. REV. 798, 808 (1976).

74. See *id.*

75. See Wenik, *supra* note 48, at 1803.

76. See Booth, *supra* note 4, at 59; see also *supra* notes 4-6 and accompanying text.

to people that they have a responsibility to help.⁷⁷ Therefore, the creation of an expectation of intervention justifies enactment of "Bad Samaritan" statutes.

2. *Personal Responsibility and Prior Decision to Intervene.*—"Bad Samaritan" legislation would also aid in developing a personal responsibility and a prior decision on behalf of bystanders to help. Bystanders are more likely to intervene if they feel personally obligated to do so and if they made a prior decision to intervene when necessary. A feeling of personal responsibility on the part of the bystander influences their decision whether or not to intervene. Individuals are more likely to act in a prosocial manner when they feel personally responsible or under an obligation to do so.⁷⁸ In a 1972 experiment by professor and psychologist Thomas Moriarty, only twenty percent of bystanders intervened to stop a would-be thief.⁷⁹ However, when the owner of the belongings asked the bystander to watch her things, ninety-five percent of those asked to watch intervened to stop the thief.⁸⁰ Moriarty's study further revealed that when a prior decision to help was made, failure to intervene decreased.⁸¹

If all potential bystanders and witnesses were under a duty to intervene, personal responsibility and a prior decision to help would be created. When faced with a crime in which the victim needs assistance, a bystander may feel a personal responsibility and would know that intervention is required. Further, the obligation of the statute would serve as a prior decision to intervene. Intervention would be increased by this personal responsibility and prior decision. Because it would motivate bystanders to intervene, enactment of "Bad Samaritan" legislation is justified.

3. *Drawing the Bystander to the Victim.*—A statute meant to benefit the victim would draw potential bystanders to the suffering of crime victims. Psychological studies indicate that emotions play an important motivational role in rendering assistance.⁸² Psychologist Robert Kidd believes that intervention is not based on cognitive decision making, but instead on the bystander's impulses and emotional arousal.⁸³ Should the witness experience emotional arousal in witnessing another in distress, intervention will result if the act of intervention

77. See DAVID O. SEARS ET AL., *SOCIAL PSYCHOLOGY* 343 (6th ed. 1988).

Mandatory crime reporting can also serve as a substitute for, or supplement to, the social influence that traditionally came from sources such as the community, family, and religion. By making the failure to report crime a criminal offense, the proposal combats indecision through its provision of an accepted course of action and its explicit determination that a decision to ignore crime is wrong and socially unacceptable.

Id.

78. See *id.* at 348.

79. See *id.*

80. See Thomas Moriarty, *Crime, Commitment, and the Responsive Bystander: Two Field Experiments*, 31 J. PERSONALITY & SOC. PSYCHOL. 370, 373 (1975).

81. See *id.* at 371.

82. See, e.g., Bernard Weiner, *Inferences of Responsibility and Social Motivation*, 27 ADVANCES IN EXPERIMENTAL PSYCHOL. 1, 26 (1995).

83. See Kidd, *supra* note 8, at 37.

is the bystander's dominant response.⁸⁴ Kidd believes that the bystander's focus of attention—the person on whom the bystander is focused when he or she witnesses a crime—determines the bystander's response.⁸⁵

While Kidd believes that legislation itself will not lead to increased intervention, he does believe that the media's role in increasing awareness of the victims could promote intervention.⁸⁶ Therefore, legislation combined with increased media attention could serve to increase intervention. Rather than focusing on the need to capture criminals, "Bad Samaritan" statutes should direct attention to the plight of the victims of crime and the need to intervene in order to render assistance to those in danger. By focusing on the victim's suffering, "Bad Samaritan" statutes would lead to increased intervention, further justifying their enactment.

4. *Normalizing Responsibility of Bystanders.*—A statute which imposes a duty to intervene by reporting a crime in order to assist the victim requires the same responsibility of all bystanders at the scene of a crime. The presence of other bystanders is often cited as a reason witnesses fail to intervene.⁸⁷ Several reasons for this have been posed. When multiple bystanders are present, the responsibility of intervention is shared among them all and, as a result, no one helps.⁸⁸ Also, the potential blame for failing to intervene may be diffused among all of the bystanders.⁸⁹ Witnesses often believe that others are acting and so their assistance is not needed.⁹⁰ The presence of other on-lookers also creates "evaluation apprehension," the fear of being judged by other witnesses.⁹¹

A duty to intervene would impose the same duty and the same level of responsibility on all bystanders at the crime scene. Each bystander would be equally punishable for the failure to report, and one would know that if they did nothing, they would face the consequences for their omission. Because the only requirement would be a notification of the authorities, evaluation apprehension would be diminished as there is no conduct to be judged by the other bystanders. Normalizing responsibility would increase motivation to intervene, further

84. See *id.* at 31.

85. See *id.* at 33.

If the bystander focuses his attention on the suffering of the victim it is more likely that helpful responses will be evoked On the other hand, if attention is directed towards other aspects of the situation, such as the characteristics of an assailant, or the potential for violence, a bystander is attending to the dangerous elements of the situation. This focus on danger, as opposed to suffering, makes it less likely that helpful or altruistic responses will be produced by the same circumstances.

Id.

86. See *id.* at 37.

87. See generally John M. Darley & Bibb Latane, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377, 377 (1968).

88. See *id.* at 378.

89. See *id.*

90. See *id.*

91. Wenik, *supra* note 48, at 1789.

justifying "Bad Samaritan" legislation.

5. *Self-gratification*.—Finally, reporting crime fulfills a personal need for self-gratification. According to a survey conducted by Robert Wuthnow, seventy-three percent of the public said that helping people in need was absolutely essential or very important, twenty-four percent reported that it was fairly important, and only two percent felt that it was not very important.⁹² Other studies indicate that most people believe that helping others is a good way of gaining self-fulfillment.⁹³ The Bad Samaritan Statute would motivate bystanders to intervene thereby increasing assistance to victims. In addition, satisfying the obligation imposed by the Bad Samaritan Statute would offer bystanders a sense of self-fulfillment. This increased motivation and sense of self-fulfillment further support enactment of Bad Samaritan legislation.

III. PROPOSED DUTY AND PROPOSED PENALTIES

As the above discussion demonstrates, sociological and psychological justifications exist for enacting Bad Samaritan intervention statutes. This Part proposes a duty to report crimes and discusses the benefits of a duty to report crime statute. In addition, the absence of constitutional prohibitions on such a duty, possible penalties for breach of such duty, and the challenges of enforcement are addressed.

A. *Proposed Duty*

As discussed above, intervention means either reporting the crime or providing direct assistance to a crime victim.⁹⁴ This Note proposes bystander intervention by reporting specifically enumerated crimes in order to aid the crime victim.

The proposed statute would require bystander intervention by summoning the authorities in order to assist the victim of specific crimes such as assault, battery, sexual assault, and homicide. In order to provide clarity to bystanders, the proposed legislation should focus on the specific crimes or acts that must be reported rather than a more general duty to report a crime.⁹⁵ The rationale for reporting the crime should be assisting the victim rather than aiding in the apprehension of criminals.⁹⁶ A statute creating a duty to intervene on behalf of the crime victim by summoning the authorities would be easily fulfilled by the bystander, would readily alert a witness to the need for intervention, and would provide a safe means of intervention where the bystander's role is clearly defined.

92. See ROBERT WUTHNOW, ACTS OF COMPASSION: CARING FOR OTHERS AND HELPING OURSELVES 10 (1991).

93. See *id.* at 87.

94. See *supra* note 8.

95. See, e.g., MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990). But see HAW. REV. STAT. 663-1.6(1) (Michie 1995).

96. See discussion *supra* Part II.B.1.

1. Duty Would Be Easily Fulfilled.—A statute requiring a bystander to report specific crimes and summon the authorities to assist a victim would clearly set out the bystander's easily fulfilled duty. Competence is a factor influencing responsibility and the obligation to intervene. People feel a greater sense of obligation to intervene where they feel they have the skills to effectively assist.⁹⁷ The proposed statute would require the bystander to notify the authorities in order to assist the crime victim. The proposed duty would not require the bystander to fight off an attacker or provide medical assistance to the crime victims. To fulfill the duty, the bystander need only summon the authorities to the crime scene by dialing 911 or using an alternative method. No special skills, medical or otherwise, are required to notify the authorities. Conversely, if direct assistance were required, a bystander may feel that special skills would be needed. Therefore, by requiring only that bystanders notify the authorities, bystanders would be less likely to feel incompetent to act.

Bystanders often cite fear of doing the wrong thing as a reason why they fail to intervene.⁹⁸ Where only some form of notification is required, the fear of acting inappropriately would be lessened. Little preparation to act would be required because all the bystander must do is call the authorities when a specifically enumerated crime is witnessed. The statute would define the content of the duty, to contact the authorities, and specify when the bystander has the duty.

2. Creates a Perception of Need.—When deciding to help a victim, a bystander must first notice the crime and then decide whether or not help is needed. Next, if help is required, the bystander must consider his or her own personal responsibility to act. Third, the bystander may weigh the costs and rewards of helping or not helping. Finally, the bystander must decide what type of help is needed and how to provide it.⁹⁹

By defining specifically when intervention is required, i.e. through specifically enumerated acts, the bystander's perception of a need would be fulfilled. Psychologist David Sears has defined five characteristics that lead to the perception that an event is an emergency, and therefore that intervention may be needed: "(1) [s]omething happens suddenly and unexpectedly, (2) there is a clear threat of harm to a victim, (3) [t]he harm to the victim is likely to increase over time unless someone intervenes, (4) [t]he victim is helpless and needs outside assistance, and (5) [s]ome sort of effective intervention is possible."¹⁰⁰

Requiring intervention when another is the victim of assault, battery, sexual assault, or homicide, for example, would fulfill the above mentioned characteristics. Such situations pose a clear threat of harm to the victim. The harm to the victim would likely increase over time unless someone intervenes. The victim is likely to be helpless in such situations and would need outside assistance. Finally, by fulfilling the duty of summoning the authorities, an

97. See SEARS ET AL., *supra* note 77, at 350.

98. See generally Yeager, *supra* note 3, at 15-16.

99. See SEARS ET AL., *supra* note 77, at 346.

100. *Id.* at 348.

effective intervention would be possible as those trained to intervene would be directed to assist the victim.¹⁰¹

By defining what acts must be reported, bystanders would know that an act is criminal and that notification is required. Crime reporting depends upon the bystander defining an act as a crime. The bystander must recognize a criminal act before he or she will be required to report it.¹⁰²

Once an act of violence has been witnessed, bystanders may or may not define it as a crime.¹⁰³ By knowing that an act is a crime, the bystander will apply a criminal label without hesitation.¹⁰⁴ Non-reporting may be caused in part by a failure to connect the observed behavior with a criminal label.¹⁰⁵ By listing the crimes that require reporting, the statute lays out when a bystander must notify the authorities. The bystander would easily be able to define the conduct as a crime and the criminal label would be attached, making the bystander more likely to intervene.

3. *Safe Intervention.*—Crime reporting, as a means of providing assistance to the victim, allows for intervention, but in a means safer for the bystander than requiring a direct rescue. Even after the criminal label has been attached or an emergency defined,¹⁰⁶ a bystander may not intervene because the cost of doing so outweighs the benefit.¹⁰⁷ Many witnesses fail to become involved because they fear harm or retaliation.¹⁰⁸ The proposed statute would require bystander intervention by summoning the authorities to aid the victim. Like many of the existing intervention statutes, this statute would require intervention by notification only where it may be completed reasonably and without harm to the bystander.¹⁰⁹

A duty to summon the authorities would only arise where the intervention

101. See FEINBERG, *supra* note 51, at 169-71.

102. See Robert F. Kidd, *Crime Reporting: Toward a Social Psychological Model*, 17 CRIMINOLOGY 380, 381 (1979). Kidd provides a model of the psychological process involved with crime reporting. He finds three important questions:

1. Once a possible act of violence or theft has been seen, what aspects of the situation and what characteristics of the bystander lead to its definition as a crime?
2. What are the cognitive processes involved in the decision to report an alleged violation?
3. What possible motivational factors influence the probability of reporting the crime?

Id.

103. See SEARSET AL., *supra* note 77, at 348. "Our interpretation or definition of a situation is a vital factor in whether or not we offer aid." *Id.*

104. See Kidd, *supra* note 102, at 387.

105. See *id.* at 391.

106. See discussion *supra* Part III.A.

107. See Kidd, *supra* note 102, at 392.

108. See Yeager, *supra* note 3, at 15.

109. See, e.g., MINN. STAT. ANN. § 604A.01 (West 1999 Supp.). See *supra* note 22.

may be made without danger to the rescuer. Under the harm principle, intervention is only justified where it may be completed safely.¹¹⁰ Where the bystander is unable to safely summon the authorities, the duty to do so would not arise. Further, notification of the authorities may be made safely where a rescue would not. Under the Duty to Aid the Endangered Act, Vermont requires a person to aid someone known to be exposed to grave physical harm, but only to the extent that aid may be rendered without harm to the one obligated to assist.¹¹¹ The Vermont Supreme Court held in *State v. Joyce*¹¹² that the Duty to Aid the Endangered Act does not create a duty to intervene in a fight because such a situation would present danger or peril to the rescuer which, under the statute, prevents a duty from arising.¹¹³ However, the Vermont statute does not provide that notification of the authorities satisfies the rescue as the Minnesota¹¹⁴ and Wisconsin¹¹⁵ duty to assist statutes.¹¹⁶ A bystander may be able to safely notify the authorities and satisfy the proposed duty where a rescue could not be made. However, as in *Joyce*, intervention would not be required under the proposed statute where it could not be done safely.

This Note proposes a duty of intervention, that would require bystanders to assist, the victims of specific crimes such as assault, batter, sexual assault, and homicide by notifying the authorities. Such a duty would be easily fulfilled, would create a perception of need, and would provide for safe intervention. The proposed duty, requiring bystanders to notify the authorities, would only arise where it may be executed without harm to the bystander.

B. Absence of Constitutional Prohibitions

A statute imposing a duty on bystanders to report crime in order to assist crime victims does not violate the U.S. Constitution. Neither the Fifth Amendment nor the Due Process Clause bar such legislation.

1. *Self-incrimination.*—A statute requiring a bystander to report specifically enumerated crimes would not violate the Fifth Amendment's prohibition on self-incrimination.¹¹⁷ The bystander would not be under a duty to report a crime where notifying the authorities would lead to the bystander's self-incrimination. In response to a prosecution under the Ohio duty to report statute,¹¹⁸ the Ohio Court of Appeals held, in *State v. Wardlow*,¹¹⁹ that the statute was unconstitutionally applied where the defendant would incriminate himself or

110. See FEINBERG, *supra* note 51, at 150-59.

111. See VT. STAT. ANN. tit. 12, § 519 (1973); see also *supra* note 24.

112. 433 A.2d 271 (Vt. 1981).

113. See *id.* at 273.

114. See MINN. STAT. ANN. § 904A.01 (West 1999 Supp.).

115. See WIS. STAT. ANN. § 940.34 (West 1996).

116. See *supra* notes 22, 25.

117. See U.S. CONST. amend. V.

118. OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

119. 484 N.E.2d 276 (Ohio Ct. App. 1985).

herself.¹²⁰ Therefore, where the defendant would incriminate himself or herself by reporting the crime, the duty under the proposed legislation would not arise.

2. *Due Process Clause*.—One potential challenge to a duty to report crime statute is that such a criminal statute is void for vagueness and therefore violates the due process clause of the Fourteenth Amendment. The Due Process Clause states that no State shall “deprive any person of life, liberty, or property, without due process of law. . . .”¹²¹ Vague statutes fail to provide notice of exactly which acts are forbidden¹²² and lead to uncertainty as to the meaning of penal statutes, at the “peril of life, liberty or property.”¹²³ Therefore, everyone is entitled to know what the state requires or prohibits.

The proposed statute, requiring those who witness certain crimes notify the authorities in order to aid the crime victim, specifies what criminal acts must be reported to the authorities by a bystander in order to assist the victim. In *State v. Wardlow*,¹²⁴ the Ohio Court of Appeals held that the Ohio “duty to report” statute was not unconstitutionally void for vagueness.¹²⁵ The statute states in part that “[n]o person, knowing that a felony has been or is being committed, shall knowingly fail to report”¹²⁶ The court found that the statute gives a person of fair intelligence notice that failure to report witnessed crimes is forbidden and is therefore not unconstitutionally void for vagueness.¹²⁷ The proposed statute is more specific than the Ohio statute. The proposed statute would enumerate those specific crimes that must be reported. Because the Ohio statute survived a void for vagueness challenge, the proposed statute would also likely survive any void for vagueness challenge.

Not only would the proposed standard provide a clear duty for bystanders, it would also provide a clear standard for enforcement. Another due process challenge is that vague statutes fail to provide explicit standards for law enforcement, allowing discriminatory and arbitrary enforcement.¹²⁸ Because the proposed statute clearly defines when a bystander must report a crime to the authorities in order to assist the victim, it is also clear to the authorities when the statute has been violated.

120. See *id.* at 279.

121. U.S. CONST. amend. XIV, § 1.

122. See *Parker v. Levy*, 417 U.S. 753, 774-75 (1974) (Stewart, J. dissenting) (“[B]y failing to provide fair notice of precisely what acts are forbidden, a vague statute ‘violates the first essential of due process of law.’” (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926))); see also SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 304 (6th ed. 1995).

123. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

124. 484 N.E.2d 276 (Ohio Ct. App. 1985).

125. See *id.* at 279.

126. OHIO REV. CODE ANN. § 2921.22 (Anderson 1996).

127. See *Wardlow*, 484 N.E.2d at 279.

128. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-71 (1972).

C. Penalties and Enforcement

1. *Penalties.*—Penalties for violating current duty to assist or report statutes provide a guide for other such statutes. Existing duty to intervene statutes' penalties range from a fine of \$100 to \$2500 and/or jail time of up to six months.¹²⁹ Implementing existing penalties such as fines and/or jail time for up to six months would serve the purposes of criminal punishment.

The goals of punishment include retribution, deterrence, reform, and incapacitation.¹³⁰ As with other criminal offenses, punishment by either a fine or incarceration would serve the purposes of punishment. Fining and/or jailing would prevent future violations, correct the offender, prevent excessive or arbitrary punishment, and provide a fair warning for punishment of others.

2. *Enforcement.*—One potential argument against the creation of a legal duty to intervene on behalf of the victims of crime is the difficulty in enforcing such a duty. One concern is determining whether the duty to intervene by reporting has been breached. If the witness is still standing at the crime scene when the police finally arrive at the scene, then the breach of the duty would be obvious. However, knowing whether a witness was present would be almost impossible. If the victim dies, it is unlikely that the assailant would later report the bystander's presence, and more unlikely that he or she could identify the witness. If the victim were to live, it would be possible that the victim may not be able to remember the bystander well enough to identify him or her.

The inability to punish all persons who breach the duty should not deter its creation. A statute imposing the duty to notify the authorities in order to aid the

129. See R.I. GEN. LAWS §§11-1-5.1; 11-56-1 (1994); MASS. GEN. LAWS ANN. ch. 268, § 40 (1990); VT. STAT. ANN. tit. 12, § 519 (1973).

130. See KADISH & SCHULHOFER, *supra* note 122, at 102-30.

The general purposes of the provisions governing the sentencing and treatment of offenders are:

- (a) to prevent the commission of offenses;
- (b) to promote the correction and rehabilitation of offenders;
- (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
- (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
- (e) to differentiate among offenders with a view to a just individualization in their treatment;
- (f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
- (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;
- (h) to integrate responsibility for the administration of the correctional system in a State Department of Correction.

MODEL PENAL CODE § 1.02(2) (Official Draft 1962), *reprinted in* KADISH & SCHULHOFER, *supra* note 122, at 1132.

crime victim would demonstrate the importance of assisting victims even if it is unlikely most will be punished. Little litigation has occurred under any of the current affirmative duty statutes at the state level. However, criminal statutes may have symbolic value even if little litigation occurs. "In some instances, the public is less concerned with the 'tangible deprivations and discomforts that go with punishment' than with 'a symbolic denunciation of what he or she did.'"¹³¹ Creating such a statute would demonstrate that failing to report an offense is unacceptable conduct.¹³²

Authorities would be able to punish violators as they see fit, possibly choosing to punish only serious violations.¹³³ Selective enforcement should not deter enactment of a statute requiring intervention on behalf of the victim. Selective enforcement is permissible and a constitutional violation only when the statute's enforcement is based on invidious discrimination.¹³⁴

IV. STATE VS. FEDERAL LEGISLATION

While justifications for a statute creating a duty to report crime in order to aid the victim exist, such legislation is solely within the states' power. Such a statute at the federal level would infringe on the broad police power provided to the states, exceed the power of Congress to create federal crimes, and exceed the purpose of federal crimes. In addition, such legislation at the federal level would unduly burden the federal judiciary.

A. Broad Police Power Reserved for the States

The creation of a statute imposing a duty to report crime and a criminal penalty for its breach falls within the broad police power reserved for the states. State governments have the power to regulate their affairs for the protection or promotion of public health, welfare, safety, and morals, and they do not need to rely on specific constitutional authorization when criminalizing conduct.¹³⁵ "[O]ne transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light . . . [is] the ordinary administration of criminal and civil justice."¹³⁶ As the Supreme Court has stated, "[u]nder our federal system, the 'states possess primary authority for defining and enforcing the criminal law.'"¹³⁷ Therefore, because the states have authority to define what conduct is criminal, they may

131. Yeager, *supra* note 3, at 34 n.160 (quoting LEO KATZ, *BAD ACTS AND GUILTY MINDS* 28 (1987)).

132. See *supra* notes 44-71 and accompanying text.

133. See Wenik, *supra* note 48, at 1805.

134. See *id.*

135. See LAFAVE & SCOTT, *supra* note 9, at 128; Richard H. McLeese, *Federal Criminal Jurisdiction*, ILL. INST. FOR CONTINUING LEGAL EDUC. § 1.2 (1997).

136. THE FEDERALIST NO. 17, at 81 (Alexander Hamilton) (Garry Wills ed., 1982).

137. United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

impose a duty to intervene on behalf of victims of crime.

States define criminal conduct and assign appropriate penalties in light of the goals of criminal law that the states have accepted. Because the harm of criminal conduct is localized, the states have a more immediate interest in defining and enforcing criminal statutes.¹³⁸ The individual states should decide what crimes must be reported and how violations should be punished.

B. Federal Criminal Legislation

While the states possess broad police power, the federal government does not possess such a plenary police power.¹³⁹ "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."¹⁴⁰ A bystander intervention statute does not fall within the traditional federalization of crime framework.

1. *Development of Federal Criminal Legislation.*—The development of federal criminal law within the United States has not been systematic. It has developed and evolved "piecemeal."¹⁴¹ Before the Civil War, few federal statutes criminalized conduct already criminal under state law; rather, federal criminal jurisdiction was limited to acts directly injurious to the federal government.¹⁴² Following the Civil War, federal sanctions were created to protect private individuals from invasions of their rights by other private individuals, traditionally a function of state law.¹⁴³ In the Twentieth Century, federal intervention into matters once exclusively the function of state criminal law has increased; federal criminal law is a "[Twentieth] Century phenomenon."¹⁴⁴

Two general categories of federal crimes exist: those criminalizing activities that occur in federal territories and those criminalizing activities that occur within state territories. Where the criminal activity occurs within a federal territory, such as on a military base or in Washington, D.C., the federal government has broad police power similar to the states.¹⁴⁵ However, where the criminal activity occurs within the territory of the states, the federal police power

138. See Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1132-133 (1997).

139. See *Lopez*, 514 U.S. at 566.

140. *Id.* at 561 n.3 (quoting *Screws v. United States*, 325 U.S. 91, 109 (1945)).

141. SARA SUN BEALE, 2 ENCYCLOPEDIA OF CRIME & JUSTICE 779 (Sanford H. Kadish et al. eds., 1983).

142. See *id.* at 776.

143. See McLeese, *supra* note 135, § 1.5.

144. *Id.* Currently, there are more than 3000 federal crimes. See Moohr, *supra* note 138, at 1128 n.5.

145. See LAFAVE & SCOTT, *supra* note 9, at 118.

is less broad, and legislation is permitted only by the Constitution.¹⁴⁶

2. *Functions of Federal Criminal Legislation.*—Federal criminal law serves three functions. It punishes conduct that is injurious to the federal government,¹⁴⁷ it serves to secure compliance with federal administrative regulations,¹⁴⁸ and it is used to punish conduct of a local concern with which the local police are unable or unwilling to cope.¹⁴⁹

A statute requiring bystander intervention does not fall within the first two functions of federal criminal law. It is not directly injurious to the federal government and does not serve to secure compliance with federal administrative regulations. Rather, a bystander intervention statute involves punishing conduct of a purely local concern.¹⁵⁰ However, nothing has indicated that it is a matter with which the local police are unable or unwilling to cope. An example of this would be statutes prohibiting flight across state lines to avoid state criminal prosecution.¹⁵¹ The proposed statute involves conduct that the states have not attempted to legislate, not conduct that they are unable or unwilling to enforce. Therefore, legislation is not justified at the federal level.

3. *Federal Criminal Legislation Must Be Within the Constitution.*—As discussed above,¹⁵² the power of Congress to create federal crimes must be expressed or implied within the Constitution. The Constitution grants Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁵³ The Necessary and Proper Clause, however, is only applicable where Congress is carrying out other powers vested by the Constitution.¹⁵⁴ While a federal statute creating a duty to intervene may in itself be deemed necessary and proper by Congress, if the power to enact such a statute is not found elsewhere in the Constitution, Congress may not create it.

The Commerce Clause¹⁵⁵ provides Congress with the majority of its power

146. *See id.*

147. *See id.* at 124. Examples include treason, espionage, bribery of federal officials, and murder of federal officials. *See id.*

148. *See id.* An example of federal criminal legislation serving to secure compliance with federal administrative regulations includes 18 U.S.C. §§ 343-44, which “authorize the Secretary of the Treasury to require by rule or regulation that certain information be kept by those who traffic in cigarettes and provide for the imposition of criminal penalties for violations of such rules and regulations.” McLeese, *supra* note 135, § 1.4.

149. *See* LAFAYE & SCOTT, *supra* note 9, at 124.

150. *See id.*

151. *See id.*

152. *See supra* notes 139-46 and accompanying text.

153. U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause).

154. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.2, at 122 (5th ed. 1995).

155. U.S. CONST. art. I, § 8, cl. 3.

to legislate.¹⁵⁶ The Commerce clause grants Congress the power “[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”¹⁵⁷ Prior to *United States v. Lopez*,¹⁵⁸ Congress had almost unlimited power under the Commerce Clause provided it was related to or affected interstate commerce.¹⁵⁹ After *Lopez*, the Commerce power exists only where: (1) the activity being regulated affects the channels of interstate commerce, i.e. the highways, waterways, airways,¹⁶⁰ (2) the activity affects the instrumentalities of interstate commerce, i.e. machinery used in interstate commerce,¹⁶¹ or (3) the activity has a substantial effect on interstate commerce.¹⁶²

Bystander intervention to assist the victim of crime probably does not fall within the power of the Commerce Clause. Because the channels of interstate commerce and the instrumentalities of interstate commerce are not involved in a bystander intervention statute, Congress may only regulate in this area if the activity under regulation has a substantial affect on interstate commerce. In determining whether an activity substantially affects interstate commerce, a number of factors are considered including (1) whether the activity is commercial; (2) whether it is one traditionally reserved for state regulation; (3) whether the regulation contains a jurisdictional element; and (4) whether Congress has provided legislative findings to support a need for regulation.¹⁶³ Before *Lopez*, only some minimal threshold effect on interstate commerce was required. After *Lopez*, the effect on interstate commerce must be substantial.¹⁶⁴ Criminal acts involving victims are not commercial activities. Further, the activity is one that is traditionally reserved for the states. As discussed above,¹⁶⁵ defining and enforcing crimes are within the broad police power reserved for the states and are therefore activities traditionally reserved for the states. Because bystander intervention is not within the Commerce power, Congress is not

156. “Congress’ authority to enact criminal statutes which are not aimed at protecting direct federal interests has usually been based in the commerce power, and less frequently, in the postal power or the taxing power.” NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 16 (2d ed. 1993).

157. U.S. CONST. art. I, § 8, cl. 3.

158. 514 U.S. 549 (1995).

159. From 1937 to 1995 the Supreme Court would invalidate a federal statute on the grounds that the statute was beyond the commerce power. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Agricultural Adjustment Act of 1935 was within commerce power as local farmers would have a cumulative effect on interstate commerce and that the act was reasonably related to protecting interstate commerce); *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935, based on the conclusion that a labor stoppage would substantially affect interstate commerce).

160. See *Lopez*, 514 U.S. at 558.

161. See *id.*

162. See *id.* at 559.

163. See *id.* at 560-65.

164. See *id.* at 559.

165. See discussion *supra* Part III.C.2.

justified in enacting such a statute.

C. Burden on the Federal Judicial System

Enacting a federal duty to intervene statute is further inappropriate because of the burden it would place on the federal judiciary. When more federal crimes are created, the criminal caseload is increased and the resources allocated to criminal cases are shifted. Criminal cases account for only seventeen percent of the total federal judicial docket, but they take up a disproportionate share of judicial resources.¹⁶⁶ By creating a federal statute requiring bystander intervention, enforcement would increase the criminal caseload. As well, judicial resources allocated for criminal prosecutions would be further strained in order to enforce the bystander intervention statute.

Not only would enforcement of a federal bystander intervention statute result in straining already full dockets, it would also logically result in a decline in resources available for civil cases. The Speedy Trial Act requires the dismissal of charges that are not brought within specified time periods;¹⁶⁷ therefore, criminal cases receive top priority. In order to respond to increased pressure from the criminal caseload, the federal courts have reduced the resources available for civil disputes.¹⁶⁸ Civil cases would be even further delayed if federal courts were to enforce a federal bystander intervention statute.

State courts are better equipped to enforce a duty to intervene statute, and enforcement at the state level would not interfere with the primary functions of the federal judiciary. The primary functions of the federal courts are interpreting federal law, declaring federal rights, and providing a neutral forum for interstate disputes.¹⁶⁹ "With less than 650 trial judges nationwide, the federal judicial system performs a distinctive function not shared by the much larger state judicial systems."¹⁷⁰ Because the creation of a federal duty to intervene statute would over burden the federal judicial system, such a statute belongs in the states where it would be more effectively enforced.

D. Alternatives to Federal Legislation

Rather than creating a federal duty to intervene statute, Congress may more efficiently act on the subject and motivate the states to enact such statutes by conditioning state funding on the states' enactment of a bystander intervention statute. The Spending Power¹⁷¹ provides Congress the power to spend for the general welfare. "Congress can employ its spending power to supplement state

166. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 985 (1995).

167. See 18 U.S.C. §§ 3161-3174 (1994); see also U.S. CONST. amend. VI, § 1.

168. See Beale, *supra* note 166, at 988.

169. See *id.* at 988-89.

170. *Id.* at 989. The U.S. Code indicates that there are 632 federal district court judges. See 28 U.S.C. § 133 (1994).

171. U.S. CONST. art. I, § 8, cl. 1.

and local resources rather than enlarging either the number of federal prosecutors and investigators or the scope of their jurisdiction.”¹⁷² Such action by Congress would express its concern for a duty to intervene statute, yet avoid strain on the federal judicial system. “Conditioning federal aid upon the acceptance of federal standards formally observes the bounds of federalism while, as a practical matter, moving the federal system towards uniform standards.”¹⁷³

As discussed above,¹⁷⁴ only after demonstrated state failure should the federal government step in to enact and enforce a duty to intervene statute. “The state failure model is based on a rebuttable presumption against expanding the jurisdiction of the federal courts . . . The presumption against federal crimes that duplicate state crimes may be rebutted when state prosecution is demonstrably inadequate and when other important federal interests are not unduly impaired.”¹⁷⁵ There is little evidence that states have failed to enforce bystander intervention statutes. Many states have yet to enact such legislation. Further, there is little evidence of failure to enforce existing statutes. Because states have not started to enact such legislation, there is no evidence that they have failed to enforce a bystander intervention statute. Therefore, bystander intervention legislation belongs within the states.

CONCLUSION

Historically, a duty to rescue has not existed in American jurisprudence. Some states, however, have reacted to serious omissions and enacted “Bad Samaritan” or “Duty to Intervene” statutes. Every state should follow their lead and enact such statutes, requiring a bystander to intervene to assist the victim of specifically enumerated crimes by notifying law enforcement officials. Such statutes are justified by the moral obligation to help others, a civic duty to report crime, and the societal interest in preventing harm. As well, such statutes would create a societal expectation of intervention, serve as a prior, personal decision to intervene, and would serve to publicize the suffering of crime victims. A statute requiring bystander intervention would clearly define the bystander’s role and provide the bystander with a safe means of intervention.

Although Bystander intervention legislation is justified and should be enacted, such legislation belongs in the states, not in the federal government. The federal government does not possess the broad police power of the states and such legislation is not within the enumerated powers of the Constitution. Finally, bystander intervention legislation at the federal level would unduly burden the federal judicial system. Therefore, bystander intervention legislation belongs in the domain of the state legislatures.

172. Beale, *supra* note 166, at 1008.

173. *Id.* at 1010.

174. See discussion *supra* Part IV.B.1.

175. Moohr, *supra* note 138, at 1142.

ACCOUNTING FIRMS AND THE UNAUTHORIZED PRACTICE OF LAW: WHO IS THE BAR REALLY TRYING TO PROTECT?

ELIJAH D. FARRELL*

INTRODUCTION

From the Big Five¹ to the smallest companies, accounting firms are expanding into nontraditional businesses more than ever before.² As a result, accounting firms are increasingly “adding lawyers as employees who can contribute to the services that the firms provide their accounting or financial services clients.”³ Much of the new business accounting firms are undertaking is a natural extension of services already being offered.⁴ Tax practice is an obvious example of this extension.⁵

The growing concern among lawyers is that accountants are moving into their territory.⁶ Many lawyers feel, because of their size and reach, that if the Big Five expand into legal services, then they will immediately dominate the market.⁷ This has law firms worried because accounting firms already dominate business

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1. See Kenneth Li, *Merger of Price Waterhouse, Coopers Firm Creates 'Big 5,'* BUFF. NEWS, Sept. 19, 1997, at A12 (explaining that through mergers the Big Eight have been reduced to the Big Five); BLACK'S LAW DICTIONARY 163 (6th ed. 1990) (defining “Big Eight” to be the largest certified public accounting firms in the United States based on such factors as gross receipts, number of staff, etc.); Dennis Taylor, *Merged PriceWaterhouseCoopers Gains Dominance Among Venture Capital Firms*, BUS. J., Aug. 24, 1998, at 1 (listing the Big Five as: PriceWaterhouseCoopers L.L.P., Arthur Andersen L.L.P., KPMG Peat Marwick L.L.P., Deloitte & Touche L.L.P., and Ernst & Young L.L.P.).

2. See Robert W. Scott, *CPA Firms Are Not Just for Accounting Anymore*, ACCT. TODAY, Mar. 17, 1997, at 24 (reporting that accounting firms hold equity in subsidiaries and affiliates that have little to do with accounting).

3. *Unauthorized Practice: Professionals Eye Entry of Accounting Firms into What May Constitute Practice of Law*, 10 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 269, 269 (June 10, 1998) [hereinafter *Unauthorized Practice*]; see also Gina Binole, *Bean Counters Eyeing Attorneys' Profits*, BUS. J. PORTLAND, Dec. 4, 1998, at 1 (reporting that the Big Five “are heavily recruiting law students and luring associates away from legal firms”); Rick Desloge, *Law Firms' Competition Coming from Accountants*, NASHVILLE BUS. J., Feb. 26, 1999, at 34 (noting that “[t]he two professions already compete to hire top tax lawyers.”).

4. See Mark Henderson, *Accounting Firms Do Number on Lawyers*, SUNDAY STAR-TIMES, Nov. 1, 1998, at E8.

5. See *id.*

6. See Amanda Bishop, *Law Panel Probing Big Six Firms—Attorneys Ask if Accountants Are Practicing Law Without Authorization*, DALLAS BUS. J., June 5, 1998, at 1.

7. See generally Cindy Kirscher Goodman, *Line Between Accounting, Law Professions May Soon Blur*, KNIGHT-RIDDER TRIB. BUS. NEWS, Mar. 14, 1999.

consulting services in the global marketplace.⁸ The problem, of course, is that lawyers employed by accounting firms cannot represent their clients in the role of attorneys because state laws prohibit, among other things, lawyers from sharing their fees with nonlawyers.⁹ As the accounting firms expand out of tax returns and into new areas of tax and business services, attorneys across the country are charging certified public accountants ("CPAs") with the unauthorized practice of law.¹⁰

In their defense, accounting firms contend that their attorneys are not practicing law.¹¹ This distinction, however, may be only a matter of semantics.¹² What many lawyers consider practicing law, accountants prefer to describe as "consulting."¹³ This highlights the fundamental difference between the two professions: accountants have a duty to be objective and publicly disclose financial statements; whereas, lawyers have an obligation to act as guardians of their clients' interests.¹⁴

Every state has laws that address many of these interrelated issues: "multidisciplinary partnerships,"¹⁵ the unauthorized practice of law, the professional responsibility of a lawyer, conflicts [of interest], and fee splitting."¹⁶ However, due to a lack of case law in these areas, many of these issues have yet to be resolved.¹⁷ Indeed, where "consulting" ends and "practicing law" begins

8. See Michael Fitz-James, *Multidisciplinary Practice Evokes Multiple Fears*, FIN. POST, Aug. 12, 1997, at 8.

9. For example, the Indiana law states: "A lawyer or law firm shall not share legal fees with a nonlawyer . . ." IND. R. PROFESSIONAL CONDUCT, Rule 5.4(a) (1996). See generally Elizabeth MacDonald, *Accounting Firms Hire Lawyers and Other Attorneys Cry Foul*, WALL ST. J., Aug. 22, 1997, at B8.

10. See Luisa Beltran, *Turf War Between Attorneys and Accountants Becomes Nasty. (Attorneys Filing Lawsuits Against Accountants for Unauthorized Practice of Law)*, ACCT. TODAY, Nov. 24, 1997, at 5.

11. See John Gibeaut, *As Accountants Edge into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault but Also Limited by Professional Rules*, 84 A.B.A. 42, 44 (1998); see also Desloge, *supra* note 3, at 34 (reporting "CPAs insist they are not interested in practicing law.").

12. See Gibeaut, *supra* note 11, at 44.

13. *Id.*

14. See *id.* at 43.

15. A multidisciplinary partnership has been defined as "a business arrangement in which individuals with different professional qualifications practice together in partnership and combine their different skills in providing advice and counsel to the consumers of their services." Gordon W. Flynn & Susan V.R. Billington, *Multidisciplinary Practices*, 50 BENCHERS ADVISORY 1, 2 (June 1997).

16. David Rubenstein, *Big Six Poised to Enter Legal Market, Privilege, Professional Rules and Conflicts Are a Barrier*, MERRILL'S ILL. LEGAL TIMES, Oct. 1997, at 1 (col. 1).

17. See Larry Smith, *Attorneys v. CPAs . . . Texas Case Crystallizes Competitive Practice Issues for Major Firms*, 17 NO. 4 OF COUNS., Feb. 16, 1998, at 1, 8.

is a relatively undistinguished area.¹⁸

In any event, the rules that currently prevent lawyer-accountants from practicing law could soon be rewritten.¹⁹ This trend has many in the legal profession worried. Some are concerned about professional identity and tradition.²⁰ Others are concerned “over the disparity between each profession’s concept of ethical duty, and the difficulty of reconciling the two standards under one roof.”²¹ Yet another concern is self-preservation,²² which is a reason why state bars across the country are closely monitoring these issues.²³

This Note examines the laws that prohibit an attorney employed in an accounting capacity from performing the same types of duties as an attorney employed in a legal capacity. Central to this examination are state laws governing the associations of lawyers with nonlawyers which restrict the types of activities that lawyers working for accounting firms may engage in.

This Note deals only with issues involving lawyers employed in an accounting capacity. While members of this group may hold CPA credentials as well, this article does not argue in favor of permitting nonlawyer CPAs to practice law, though some certainly support such a position.²⁴ Furthermore, this Note focuses primarily on the area of tax practice, though some have concerns that accounting firms are expanding into other areas of legal practice as well.²⁵

Part I will address the growing tension between law firms and accounting firms. Part II will examine what constitutes the unauthorized practice of law, including the various standards courts use to make this determination and how those standards have evolved. This part also will discuss why applying those standards to lawyer-accountants makes little sense given the historical desire of courts to protect the public from receiving inadequate advice.

Part III will focus primarily on the American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules”). In particular, this part will concentrate on those rules governing the professional independence of a

18. See Bishop, *supra* note 6, at 1.

19. See Binole, *supra* note 3, at 1; Gibeaut, *supra* note 11, at 47; David Segal, *Rivals Call Law Firms to Account; Tax Advisers Hope to Cross a Line and Compete for Legal Clients*, WASH. POST, Nov. 12, 1998, at F1.

20. See Geoffrey C. Hazard, *Accountants vs. Lawyers: Let’s Consider Facts*, NAT’L L.J., Nov. 9, 1998, at A21.

21. Bruce Balestier, *ABA Faces Arrival of Lawyer-Accountant Pairings*, N.Y.L.J., Nov. 19, 1998, at 5.

22. See generally Goodman, *supra* note 7.

23. See Binole, *supra* note 3, at 1.

24. See, e.g., Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47 (1995) (arguing that lay CPAs possess the requisite proficiency to practice tax law).

25. See, e.g., Rubenstein, *supra* note 16, at 1 (noting that at least some believe that the expansion of accounting firms will continue until the Big Five dominate transactional business law globally).

lawyer²⁶ and those rules pertaining to the unauthorized practice of law.²⁷ Also, Part III will analyze the District of Columbia's version of these same rules²⁸ as representative of a more modern approach.

Part IV will critically examine the four parts of ABA Model Rule 5.4, which contain the largest obstacle for accounting firm lawyers to practice law. In addition, Part IV will evaluate the new accountant-client privilege, enacted as part of the recent Internal Revenue Service Restructuring Reform Act of 1998.²⁹ Finally, this Note will conclude that permitting lawyer-accountants to practice law would better serve the public interest and that with the ever expanding global economy, this controversial issue may ultimately be determined by the market.

I. TENSION BETWEEN LAWYERS AND ACCOUNTANTS

Led by a global push from the Big Five, accounting firms are expanding their practices into what some would consider the legal market.³⁰ Indeed, some in the legal profession insist that in many cases their accounting firm counterparts are already practicing law.³¹ On the other hand, accounting firm attorneys prefer to call the services they provide "consulting."³² Consulting can cover most "aspects of the litigation process—from initiating a claim to negotiating a settlement."³³

Whether described as legal services or consulting services, "the upshot is the same: at least some of the work that might have been characterized as legal in former days is siphoned off to accountants and other professionals³⁴ who define the scope of their services more broadly."³⁵ This distinction between legal services and consulting services is important because lawyers in U.S. accounting firms typically cannot provide services beyond consultation.³⁶ Every jurisdiction,

26. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1995).

27. See *id.* at 5.5 (1983).

28. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998).

29. 26 U.S.C. § 7525 (1998).

30. See Andrew Willis, *Bean Counters Buying Lawyers—A Bad Idea*, THE GLOBE & MAIL, Aug. 5, 1998, at B10.

31. See Binole, *supra* note 3, at 1.

32. The services accounting firms are now providing have gone beyond traditional expert witness activities to include fraud and forensic matters, environmental expertise, contracts, mergers and acquisitions, appraisals, financial planning, litigation support, alternative dispute resolution, and international tax practice. See Gibeaut, *supra* note 11, at 42; Lori Tripoli, *Brink of Change . . . Major Accounting Firms Struggle to Redefine Litigation Support*, 16 NO. 20 OF COUNS., Nov. 3, 1997, at 14.

33. Binole, *supra* note 3, at 1; Gibeaut, *supra* note 11, at 44.

34. Other professionals include "[s]maller firms, insurance companies, investment advisers and banks [that] are moving beyond their traditional lines of business, blurring distinctions among different disciplines." Segal, *supra* note 19, at F1.

35. *Unauthorized Practice*, *supra* note 3, at 269 (quoting Professor Gary A. Munneke).

36. See *id.*; see also Goodman, *supra* note 7 (reporting that under current U.S. law, lawyer-accountants are not "allowed to offer anything beyond a straightforward consultation, such as tips

other than the District of Columbia,³⁷ has adopted a version of the Model Rules, which prohibits lawyers from sharing profits with nonlawyers³⁸ or aiding nonlawyers in performing activities that constitute the practice of law.³⁹

As with any rule, the Model Rules' deterrent value is inevitably dependent upon their interpretation.⁴⁰ Unfortunately, there is no settled definition of "practice of law." Indeed, this has been a source of debate for decades, if not centuries.⁴¹ However, in general, the practice of law can be illustrated by two situations: where the business holds the lawyer out as a lawyer, or where the business provides services that, if performed by an attorney, would constitute the practice of law.⁴² Furthermore, a lawyer violates this general prohibition "by entering a partnership or other business relationship with a nonlawyer in which any of the activities of the relationship constitute the practice of law."⁴³

Those opposed to Big Five⁴⁴ expansion argue that those accounting firms have essentially expanded the meaning of "litigation support" far beyond what the legal community previously accepted.⁴⁵ Specifically, the legal community confines its support to the Big Five's economic analysis and document analysis.⁴⁶ Proponents of Big Five expansion rebut: "The real issue causing the war between lawyers and accountants may be the flight of attorneys to the Big

on how to save on taxes"); *Lawyers Sue Big Six Firm over Legal Practice*, THE ACCT., Oct. 1997, at 5 (noting "the ability of Big [Five] attorneys to represent clients in the [United States] is tightly regulated.").

37. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998).

38. See *id.*

39. See generally *Lawyers' Aiding Unauthorized Practice*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 21:8201.

40. See J. Lee McNeely, *Protecting the Profession and the Public*, 42 RES GESTAE 5 (1999).

41. See *id.* ("The question of what constitutes the 'unauthorized practice of law' is as old as the legal profession itself. I imagine that no sooner did the first lawyer hang out his shingle, but that an imposter, in some form or another, opened shop nearby.").

42. See *Partnership with Non-lawyers*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 91:401, 91:401.

43. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:820; see also ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 cmt. (1983) ("In general, the Rules are violated when a business that is not a law firm holds the lawyer out in his or her capacity as a lawyer, or when the lawyer's services for outside clients include activities that, when performed by a lawyer, constitute the practice of law.").

44. Note that in this context the Big Five are intended to be representative of the accounting profession as a whole, at least to the extent those organizations engage in tax services. "Big Five" is used deliberately, as this is where much of the legal community's disdain is directed. However, "even small CPA firms would benefit from changes that would allow accountants and lawyers to practice together. [For example], the Big Five accounting firms could lose their referrals from law firms, which could benefit local [accounting] firms. . . ." Goodman, *supra* note 7.

45. Tripoli, *supra* note 32, at 14.

46. See *id.*

[Five].⁴⁷ There may be some truth to this allegation.⁴⁸ Higher salaries, less pressure to develop clients, and the opportunity to specialize in a unique aspect of tax law prompts many attorneys to leave their law firms.⁴⁹

More to the point, many view the legal profession's resistance to permitting lawyer-accountants from performing what have traditionally been regarded as legal tasks as economic protectionism.⁵⁰ "At stake is a hefty portion of the roughly \$100 billion-a-year market for legal advice," which, until recently, law firms have monopolized.⁵¹ Of course, the world's largest employers of attorneys are no longer law firms. For example, Ernst & Young employs approximately 3300 tax attorneys worldwide and about 850 in the United States.⁵² By comparison, Baker & McKenzie, this country's largest traditional law firm, employs about 2400 lawyers, of which only a portion practice tax law.⁵³ Perhaps more daunting for the legal community is the fact that the Big Five "are well-armed, with billions of dollars in revenues that make even the largest law firms appear as specks in the marketplace."⁵⁴

Regardless of each side's underlying motives, resolution of these issues ultimately turns on ethical considerations. In particular, lawyers must limit their associations with nonlawyers due to the ABA Model Rules of Professional Conduct.⁵⁵ In general, sound policy underlies these provisions. "[T]he public is entitled to receive legal services from individuals of competence who bring an undivided loyalty to the personal relationship between lawyer and client."⁵⁶ Unfortunately, this policy is used to justify the prohibition on nonlawyer activities that constitute the practice of law being extended to lawyer activities that aid such practice.⁵⁷

There is, however, growing pressure on the ABA to revise its rules.⁵⁸ Lawyers and accountants have already "joined forces in many firms whose members hold both law and accounting degrees."⁵⁹ Indeed, "with more lawyers

47. Beltran, *supra* note 10, at 5.

48. See Lisa Brennan, *Past Is Firms' Prologue—It Doesn't Always Work That Way, but Gurus See More of '99 Trends*, NAT'L L.J., Mar. 22, 1999, at A1 (writing that "many top U.S. law firms have lost tax . . . lawyers to accounting firms.").

49. See *id.*

50. See Desloge, *supra* note 3, at 34.

51. Segal, *supra* note 19, at F1.

52. See Goodman, *supra* note 7.

53. See *id.*; Baker & McKenzie (visited Mar. 31, 2000) <<http://www.bakerinfo.com>>.

54. Gibeaut, *supra* note 11, at 43.

55. See Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multidiscipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 194-95 (1997).

56. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

57. See *id.*

58. See Segal, *supra* note 19, at F1.

59. Patricia Manson, *ABA Panel Set to Examine Ancillary Business Practices*, CHI. DAILY L. BULL., Oct. 13, 1998, at 1.

joining the ranks of accountants, the bar is becoming a more varied constituency with contradictory interests.”⁶⁰ Furthermore, it is unlikely that the public will forever tolerate the bar’s monopoly on legal services and its power to define the “practice of law.”⁶¹

II. DEFINING PRACTICE OF LAW

A lawyer practicing in any jurisdiction, with the exception of the District of Columbia,⁶² may not form or join a partnership, professional corporation or association, or general business corporation with a nonlawyer if any of the organization’s activities include the practice of law.⁶³ Every jurisdiction in the United States has, through case law, statutes, court rules, or some combination of the three, determined what constitutes the practice of law.⁶⁴ “Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer.”⁶⁵ However, whether a particular activity falls within the general definition of “practice of law” is frequently a question of considerable debate.⁶⁶ This is particularly true in the field of taxation where questions of law and accounting are often intermingled to the point that it becomes unclear “where the functions of one profession end and those of the other begin.”⁶⁷

Accounting firms would like “to define the practice of law as narrowly as possible—essentially that it consists of arguing a client’s case in court.”⁶⁸ The wide array of services provided by accounting firms would fall outside this definition. Those opposed to accounting expansion would like to have the practice of law broadly defined as, for instance, “legal activities in many nonlitigious fields which entail specialized knowledge and ability.”⁶⁹ As a result,

60. Segal, *supra* note 19, at F1.

61. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 813 (2d ed. 1990 & Supp. 1998).

62. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 cmt. (1983) (noting the District of Columbia’s version of Model Rule 5.4 “permits the establishment of partnerships between lawyers and nonlawyers, if the sole purpose of the partnership is to provide legal services and the nonlawyer partners agree to conform to the requirements of the rules governing the activities of lawyers”).

63. See *Partnership with Non-Lawyers*, *supra* note 42, at 91:401.

64. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983).

65. HAZARD & HODES, *supra* note 61, at 1142. “The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client. . . .” *Id.*

66. See *Agran v. Shapiro*, 273 P.2d 619, 623 (Cal. App. Dep’t Super. Ct. 1954).

67. *Id.*

68. *Unauthorized Practice*, *supra* note 3, at 270.

69. *In re New Jersey Soc’y of Certified Pub. Accountants*, 507 A.2d 711, 714 (N.J. 1986) (quoting *New Jersey State Bar Ass’n v. Northern New Jersey Mort. Assocs.*, 161 A.2d 257, 261 (N.J. 1960)).

arriving at an appropriate definition of practice of law has proven considerably difficult for the courts. Nevertheless, formulating a reasonably circumscribed definition will dictate the nature of activities the lawyer-accountant is legally permitted to perform. Accordingly, the resolution of this debate is critical.⁷⁰

Courts have utilized several different approaches in their attempt to define the practice of law. Some commentators have suggested that courts adopt a comprehensive list of the various activities that would amount to the practice of law in that jurisdiction. Courts, however, have typically rejected attempting to precisely define, on an itemized basis, what constitutes the practice of law. For example, in 1991, the South Carolina Bar submitted to the state Supreme Court a set of proposed rules that attempted to "define and delineate the practice of law."⁷¹ Although the South Carolina Supreme Court commended the committee for its "Herculean efforts to define the practice of law," it did not adopt the proposed rules.⁷² The court reasoned that "it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules."⁷³ The court felt it should withhold such a determination for an actual case or controversy.⁷⁴

In addition, the court took the opportunity to clarify certain practices that, at least in South Carolina, do not constitute the unauthorized practice of law.⁷⁵ It held that "CPAs do not engage in the unauthorized practice of law when they render professional assistance . . . that is within their professional expertise and qualifications."⁷⁶ The court stated such practice "will best serve to both protect and promote the public interest."⁷⁷

This illustrates that, despite rejecting a rigid approach in defining practice of law, courts have attempted to formulate tests to reach the same results.⁷⁸ In the

70. "Lawyers who violate these rules could potentially face sanctions for the unauthorized practice of law." Segal, *supra* note 19, at F1.

71. *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123, 124 (S.C. 1992).

72. *Id.*

73. *Id.*

74. *See id.*

75. *See id.* at 124-25.

76. *Id.* at 125.

77. *Id.*

78. *See, e.g., In re Robinson*, 162 B.R. 319, 324 (Bankr. D. Kan. 1993) (defining practice of law as "the rendition of services requiring the knowledge and application of legal principles and technique to serve the interests of another with his consent") (quoting *State v. Shumacher*, 519 P.2d 1116 (Kan. 1974)); *Kentucky State Bar Ass'n v. Bailey*, 409 S.W.2d 530, 531 (Ky. Ct. App. 1966) ("The practice of law' is any service rendered involving legal knowledge or legal advice, whether of representation, counsel, or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services" (quoting RCA 3.020)); *Campaign for Ratepayers' Rights*, 634 A.2d 1345, 1350-51 (N.H. 1993) (holding that whether an act constitutes the unauthorized practice of law is to be determined from the nature, character, and quality of the act). *But see In Re New Jersey Soc'y of Certified Pub. Accountants*, 507 A.2d 711, 714 (N.J. 1986) (indicating that the practice of law often "encompasses 'legal activities in many

area of income taxation, the courts tend to define the practice of law using two tests: one based on the nature of the service rendered⁷⁹ and the other based on the difficulty of the service rendered.⁸⁰

A. Nature of Services Rendered Test

The courts' first attempts to define practice of law resulted in the development of the nature of services rendered test. One commentator described this test as a "pragmatic response to the reality that many fields of endeavor involve, to varying degrees, the application of legal principles to particular factual circumstances."⁸¹ However, using this test to produce meaningful decisions has proven considerably difficult for courts. The leading case applying this test to tax practice is *In re New York County Lawyers Association*⁸² referred to as the *Bercu* case.⁸³

In *Bercu*, the New York County Lawyers Association contended that Bernard Bercu, a certified public accountant, had engaged in the unlawful practice of law by giving tax advice to clients.⁸⁴ Bercu contended that the advice given "lay with the proper scope of the accounting profession and, therefore, did not constitute the unlawful practice of law."⁸⁵

Bercu rendered the services in question after the president of the Croft Steel Company ("Croft") had consulted him.⁸⁶ The City of New York had tax claims against Croft for three separate years, and Croft wished to deduct the payment of these taxes as a business expense during the current year rather than attributing them to the years in which the claims accrued.⁸⁷ Bercu conducted research on the issue and found a Treasury Department decision that, in his view, supported the position Croft wished to take.⁸⁸ Bercu reported his findings to Croft, expressed his opinion as to the deductibility of the prior state taxes as business expenses under the Internal Revenue Code, and offered his assistance in concluding the tax

non-litigious fields," but is not subject to precise definition (quoting *New Jersey State Bar Ass'n v. New Jersey Mort. Assocs.*, 161 A.2d 257, 261 (1960))).

79. In the present context the term "nature of services rendered" refers to whether the services in question are inherently legal or accounting services. Some courts have referred to this as the "incidental services test", though the application remains the same. See, e.g., *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951).

80. See Melone, *supra* note 24, at 59.

81. *Id.* at 60.

82. 78 N.Y.S.2d 209 (N.Y. App. Div. 1948), *aff'd sub nom. In re Bercu*, 87 N.E.2d 451 (N.Y. 1949).

83. See Melone, *supra* note 24, at 60.

84. See *In re New York County Lawyers Ass'n*, 78 N.Y.S.2d at 211.

85. *Id.*

86. See *id.* at 213.

87. See *id.*

88. See *id.* at 213-14.

claim settlement with the city in conformity with his findings.⁸⁹

Bercu admitted that he often performed this type of work and gave advice of the same character.⁹⁰ The New York County Lawyers Association sought to enjoin Bercu from pursuing these types of activities, claiming that Bercu "was dealing with complex questions of law, on which the numerous decisions were far from clear."⁹¹ They contended that Bercu had overstepped his boundaries and had entered "into a field of law and fine legal distinctions far removed from the practice of accountancy."⁹²

The court in *Bercu* declined to discuss the adequacy or accuracy of the advice given by Bercu, stating instead, "The decision must rest on the *nature of the services rendered* and on whether they were inherently legal or accounting services."⁹³ The court recognized that in the area of taxation the professions of law and accounting overlap and that an accountant must understand tax law and a lawyer must understand accounting.⁹⁴ Despite this common ground the court declared, "[S]ome line of demarcation must be observed."⁹⁵

In an attempt to draw an objective line, the court ruled that giving legal advice unconnected with accounting work constitutes the practice of law.⁹⁶ However, the court also declared, "This does not mean, of course, that many or most questions which may arise in preparing a tax return may not be answered by an accountant handling such work."⁹⁷ The court's reasoning reflected the belief that while an accountant must be cognizant of the tax law, the application of such legal knowledge in accounting work "is only incidental to the accounting functions."⁹⁸ In other words, under the reasoning of the court in *Bercu*, an accountant can "advise on a tax issue if it arose during the preparation of the [tax] return but not if the identical issue was the subject of a separate engagement."⁹⁹

It is important to note that Bercu was not a member of the bar and possessed no formal legal education. Nevertheless, this case has implications for the lawyer-accountant. *Bercu* appears to stand for the proposition that no one may render tax advice unconnected with the preparation of a tax return unless that individual is a member of the bar employed in a legal capacity.

However, this makes little sense in cases where an accounting firm employs a lawyer. The court in *Bercu* seemed concerned that permitting an accountant to render legal advice could result in inadequate advice being given. This concern

89. See *In re Bercu*, 87 N.E.2d 451, 452 (N.Y. 1949).

90. See *id.*

91. *In re New York County Lawyers Ass'n*, 78 N.Y.S.2d at 211, 215.

92. *Id.* at 215.

93. *Id.* (emphasis added).

94. See *id.* at 216.

95. *Id.*

96. See *id.* at 219.

97. *Id.*

98. *Id.* at 216.

99. Melone, *supra* note 24, at 62.

is obviated when the accountant giving the advice is also an attorney. Thus, where an accounting firm employs an attorney, applying the nature of the services rendered test seems inappropriate as a means of protecting the public from receiving poor advice.

B. Difficulty with the Nature of Services Rendered Test

The major problem courts face regarding the nature of the services rendered test is its potential to produce absurd results. For example, suppose that in two otherwise identical cases Defendant A renders legal advice connected with a tax return, and Defendant B renders the exact same advice, but such advice is unconnected with the preparation of a tax return. Presumably, under the nature of the services rendered test Defendant B would have engaged in the unauthorized practice of law while Defendant A would not have.

In order to address these inconsistencies, the courts have revised the original test to focus on the difficulty of the services rendered as opposed to the nature of those services.¹⁰⁰ Two leading cases, both of which rejected the former test, applied this modified approach.

In *Gardner v. Conway*,¹⁰¹ Conway, a public accountant and former deputy collector of internal revenue, prepared income tax returns and gave related professional advice to clients. In this particular case, the advice consisted of determining for the taxpayer whether he had attained lawful marriage status with a woman to whom he had never been ceremonially married, and whether this taxpayer and his so-called common-law wife should file a joint or separate tax return.¹⁰² In addition, Conway advised the couple on their partnership status in a business operation, and advised them on certain tax deductions.¹⁰³ Deeming this to be the unauthorized practice of law, a group of lawyers brought an action against Conway to have him perpetually enjoined from engaging in the practice of law.¹⁰⁴ Conway "defended [himself] upon the ground that, while the preparation of the tax return involved the determination of legal questions, this did not constitute the practice of law because the resolving of such questions was merely incidental to the preparation of the return."¹⁰⁵

Recognizing that "[t]he line between what is and what is not the practice of law cannot be drawn with precision,"¹⁰⁶ the court reasoned "that the distinction . . . may be determined only from a consideration of the nature of the acts of

100. See *Agran v. Shapiro*, 273 P.2d 619 (Cal. App. Dep't Super. Ct. 1954); *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951) (rejecting the nature of services rendered test).

101. 48 N.W.2d at 791.

102. See *id.* at 798.

103. See *id.*

104. See *id.* at 791.

105. *Agran*, 273 P.2d at 625 (quoting *Gardner*).

106. *Gardner*, 48 N.W.2d at 794 (quoting *Cowern v. Nelson*, 290 N.W. 795, 797 (Minn. 1940)).

service performed in each case.”¹⁰⁷ This decision appeared to mirror the nature of the services rendered test, which the court previously had rejected.¹⁰⁸ However, the court elaborated that the difficulty in applying the existing test arises only when the services in question are “incidental to the performance of other services of a nonlegal character,” such as accounting.¹⁰⁹ When services are not incidental to tax return preparation, the test becomes whether the legal questions at issue are difficult or doubtful to such a degree that “to safeguard the public, [they] demand the application of a trained legal mind.”¹¹⁰

The court decided against Conway noting that “[a]lthough the preparation of the income tax return was not itself the practice of law, [Conway had], incidental to such preparation, resolved certain difficult legal questions which, taken as a whole, constituted the practice of law.”¹¹¹ The court concluded that “[w]hen an accountant . . . is faced with difficult or doubtful questions of the interpretation or application of statutes, administrative regulations and rulings, court decisions, or general law, it is his duty to leave the determination of such questions to a lawyer.”¹¹²

In *Agran v. Shapiro*,¹¹³ Agran, a CPA, was retained as an accountant and auditor for Motor Sales of California, Inc. He was also hired to prepare the owners’ individual income tax returns. When problems arose regarding classification of a net operating loss, Agran met with the appropriate treasury agents to resolve the matter.¹¹⁴ In support of his position, Agran testified that he spent five days doing legal research, read more than 100 legal opinions, reports, and decisions on the law involved, and cited several of these cases in his meetings with Treasury Department officials.¹¹⁵

In determining what constitutes the practice of law, the court rejected the test formulated by the court in *Bercu*.¹¹⁶ In *Agran*, the court found that legal service activities that are incidental to one’s regular course of business is not determinative.¹¹⁷ Under the *Agran* court’s approach, one “is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind.”¹¹⁸ Whether something is a difficult or doubtful question is to be measured by the understanding “possessed by a reasonably intelligent layman who is reasonably

107. *Id.* at 796.

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.* at 798.

112. *Id.* at 797.

113. 273 P.2d 619, 620-22 (Cal. App. Dep’t Super. Ct. 1954).

114. *See id.* at 622.

115. *See id.*

116. *See id.* at 625.

117. *See id.*

118. *Id.* at 626 (quoting *Gardner v. Conway*, 48 N.W.2d 788, 796 (Minn. 1951)).

familiar with similar transactions.”¹¹⁹

The court ruled that Agran’s preparation of the income tax returns in question did not amount to the practice of law.¹²⁰ According to the court, any “layman without legal or accounting training might have prepared them in the first instance.”¹²¹ As to the determination of the net operating loss, however, the court reached the conclusion that it was purely a question of law.¹²² To support its position, the court suggested that Agran himself fully appreciated this, as he “detailed at length the extensive research of the legal authorities which he was required to make in order to support his position.”¹²³ Thus, the court concluded that the services rendered by Agran, other than those relating to the preparation of the income tax returns, constituted the practice of law.¹²⁴

Like the court in *Bercu*, the courts in both *Agran* and *Gardner* were primarily concerned with protecting the public welfare.¹²⁵ However, as in *Bercu*, this paternalism by the court would be misplaced in situations where a lawyer-accountant is rendering legal advice. Indeed, the court in *Gardner* recognized that the concern of permitting incompetent services is removed when members of the bar practice law.¹²⁶ Therefore, while the “difficulty of services rendered” test provides a means for defining practice of law, its application to lawyer-accountants would be meaningless, as it would proscribe the rendering of services by qualified individuals.

C. Inconsistent Results

As might be expected, in applying the nature of services rendered test and the difficulty of services rendered test, courts have reached results that are difficult to reconcile. This is especially true in cases involving lawyer-accountants. For example, in *Zelkin v. Caruso Discount Corp.*,¹²⁷ a case involving a lawyer-accountant, the court’s ruling was in direct conflict with the outcomes of *Bercu*,

119. *Id.*

120. *See id.* at 623.

121. *Id.*

122. *See id.* at 623-24.

123. *Id.* at 624.

124. *See id.* at 627.

125. *See Agran*, 273 P.2d at 625 (quoting the court in *Gardner* and stating that the interest of the public is the controlling determinant); *Gardner v. Conway*, 48 N.W.2d 788, 795 (Minn. 1951) (indicating that “protection of the public is of vital importance”); *see also Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1192 (Fla. 1978) (averring “[i]n determining whether a particular act constitutes the practice of law, our primary goal is the protection of the public.”).

126. The court stated, “The law practice franchise or privilege is based upon the threefold requirements of Ability, character, and Responsible supervision. The public welfare is safeguarded not merely by limiting law practice to individuals who are possessed of the requisite ability and character, but also by the further requirement that such practitioners shall thenceforth *be officers of the court* and subject to its supervision.” *Gardner*, 48 N.W.2d at 795 (emphasis added).

127. 9 Cal. Rptr. 220 (Cal. Dist. Ct. App. 1960).

Gardner, and Agran.

In *Zelkin*, the Caruso Corporation ("Caruso") employed Zelkin to represent them in negotiations with the Treasury Department in connection with a large deficiency assessment of income taxes. Caruso subsequently sought to avoid paying Zelkin's fee on the ground that Zelkin performed only legal services and no accounting services.¹²⁸ Caruso reasoned that as the services were entirely of a legal nature, its contract with Zelkin was illegal, thus, Zelkin was not entitled to payment.¹²⁹

Zelkin had conducted research at two separate law libraries and met with Treasury Department agents on several occasions on Caruso's behalf.¹³⁰ Zelkin testified, however, that his research was limited to determining the accounting methods used by other companies that had dealt with similar tax issues.¹³¹ Zelkin further contended that he had not reviewed any cases to determine the applicable law, and indeed, was disinterested in the results of the cases he did review when searching for the proper accounting method to apply to Caruso's situation.¹³²

Caruso argued that *Agran* was controlling and required a finding that Zelkin had engaged in the unauthorized practice of law.¹³³ The court, however, stated that *Agran* was distinguishable because in that case the accountant had reviewed over 100 cases on the issues of law involved whereas in this case Zelkin did not read any law or cite any cases.¹³⁴ The court further stated that it was possible for Zelkin to have negotiated with Treasury Department agents without making reference to any legal issues, and, as such, his actions did not constitute the unauthorized practice of law.¹³⁵

In ruling for Zelkin, the court did not strictly apply either of the traditional tests. Initially the court seemed to apply the nature of services rendered test. Based on Zelkin's testimony that he had not performed any legal research, the court determined that those services could not be the practice of law. However, the court then looked to Zelkin's objective and seemingly reached the conclusion that services are not the practice of law if the goal sought in performing those services could be attained through some other not facially legal method.

While the ruling in *Zelkin* would appear to be a victory for lawyer-accountants, it is in direct conflict with the rulings of *Bercu*, *Gardner*, and *Agran*, as well as other case law.¹³⁶ Some observers suggest that courts are willing to

128. See *id.* at 223.

129. See *id.*

130. See *id.* at 222-23.

131. See *id.* at 223.

132. See *id.*

133. See *id.* at 224.

134. See *id.*

135. See *id.*

136. At least three major decisions have held that when faced with interpretation or application of tax statutes, administrative regulations and rulings, court decisions, or general law, it is an accountant's duty to leave such questions to a lawyer. See *Agran v. Shapiro*, 273 P.2d 619 (Cal. App. Dep't Super. Ct. 1954); *Joffe v. Wilson*, 407 N.E.2d 342 (Mass. 1980); *Gardner v.*

show more deference to lawyer-accountants than to lay CPAs.¹³⁷ This may be due to the difficulty in separating these evolving professions.¹³⁸ Alternatively, it may stem from the fact that traditional concerns over competence of advice are absent from such cases. The Texas Supreme Court recently had the opportunity to explore these issues. Members of both industries closely watched this Texas case for its potential to limit, or permit, the types of services that accounting firms perform.¹³⁹

*C. Texas v. Arthur Andersen*¹⁴⁰

In 1997, accounting giant Arthur Andersen faced legal action in Texas after it was accused of the unauthorized practice of law.¹⁴¹ On June 26, 1997, a complaint against Arthur Andersen was filed with the Unauthorized Practice of Law Committee of the Texas Supreme Court.¹⁴² Some Texas lawyers contended that the accountants were encroaching on their turf in violation of Texas state law.¹⁴³ The complaint charged that Arthur Andersen "engaged in the unauthorized practice of law by offering 'attorney only' services and filing petitions in the Tax Court."¹⁴⁴ Indeed, it may have been "Arthur Andersen's habit of filing petitions in Tax Court that initially attracted the attention of the organized bar."¹⁴⁵

The "attorney only" services complained of reportedly involved Arthur Andersen engaging in "estate planning, as well as drafting corporate and partnership documents, compensation agreements, stock option agreements, and severance agreements."¹⁴⁶ Longstanding Texas law states that "accountants are

Conway, 48 N.W.2d 788 (Minn. 1951). In addition, several courts have reached the conclusion that activities designed to secure tax reductions or refunds for others may constitute the unauthorized practice of law. See *Weber v. Garza*, 570 F.2d 511 (5th Cir. 1978); *In re Moran*, 317 So. 2d 754 (Fla. 1975); *Kentucky State Bar Assoc. v. Bailey*, 409 S.W.2d 530 (Ky. 1966).

137. See Segal, *supra* note 19, at F01.

138. See *id.*; see also *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1191-92 (Fla. 1978) (contending that "any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order.'" (quoting *State Bar of Michigan v. Cramer*, 249 N.W.2d 1, 7 (Mich. 1976))).

139. See Gibeaut, *supra* note 11, at 46.

140. 674 S.W.2d 923 (Tex. 1984).

141. See James Boxell, *Arthur Andersen in Texas Held to Account for Practicing Law*, THE LAWYER, Oct. 14, 1997, at 5; Lisa Brennan, *Angry Tax Lawyers—Bar: "Bean Counters Are Doing Our Work,"* NAT'L L.J., Oct. 13, 1997, at A5; Smith, *supra* note 17, at 8.

142. See Smith, *supra* note 17, at 6.

143. See Boxell, *supra* note 141, at 5.

144. Beltran, *supra* note 10, at 5.

145. Smith, *supra* note 17, at 6.

146. *Id.*

not allowed to offer any kind of legal services, including tax law.”¹⁴⁷ However, Texas officials acknowledged the issues involving taxes were not clear because accountants must apply tax law to prepare tax returns.¹⁴⁸ In fact, a marked lack of precedent exists in this area.¹⁴⁹

Following an eleven-month investigation, the case was resolved in Arthur Andersen’s favor.¹⁵⁰ Apparently, the complaint’s allegations did not amount to the practice of law in the eyes of the Texas Supreme Court. In fact, the Unauthorized Practice of Law Committee of the Texas Supreme Court dismissed the case in a scant four-line letter, after only an hour of questioning.¹⁵¹ The difficulty in establishing a bright line separating the two professions¹⁵² may be one reason “that state courts—the ultimate arbiters of bar associations—apparently [are not] eager to punish those accused of violating rules against lawyer-accountant commingling.”¹⁵³

In any event, “the issue of whether . . . ‘consulting’ amounts to the practice of law [has not] been resolved.”¹⁵⁴ As such, in terms of defining practice of law none of the existing case law provides much guidance for the lawyer-accountant. Always paramount to each court’s decision is the desire “to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe.”¹⁵⁵ Yet, in terms of receiving complete tax advice, it does not seem that a client could do better than to enlist the services of one whom is both an attorney and an accountant. Indeed, no court has curtailed the services of a lawyer-accountant under the guise of protecting the public from shoddy advice. Instead, as the need for protecting the public dissipates, courts have cited other policy reasons for limiting the services a lawyer-accountant may perform.¹⁵⁶

147. Boxell, *supra* note 141, at 5.

148. See Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing Law*, WALL ST. J., May 28, 1998, at B15.

149. See Smith, *supra* note 17, at 8.

150. See *Andersen Cleared in Landmark Legal Services Case*, INT’L ACCT. BULL., Aug. 13, 1998, at 1; Arthur S. Hayes, *Accountants vs. Lawyers—Bean Counters Win*, NAT’L L.J., Aug. 10, 1998, at A4; Tom Herman, *A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., July 29, 1998, at A1; Jim Kelly, *‘Legal Practice’ Charges Fail*, FIN. TIMES, Aug. 7, 1998, at 4.

151. See Hayes, *supra* note 150, at A4; *Andersen Cleared in Landmark Legal Services Case*, *supra* note 150, at 1.

152. See *Gardner v. Conway*, 48 N.W.2d 788, 796 (Minn. 1951) (noting that there exists a clear overlap of law and accounting in the field of income taxation).

153. Segal, *supra* note 19, at F1.

154. Gibeaut, *supra* note 11, at 44.

155. *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978) (quoting *State v. Sperry*, 140 So. 2d 587, 595 (Fla. 1962)).

156. See, e.g., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 cmt. (1983) (claiming that courts are “protecting the integrity of the judicial system and providing a means for

Namely, courts purport to be protecting the public from the inevitable evils that would result if scrupulous lawyers were controlled in the attorney-client relationship by unethical laypersons.

III. ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.4

A. Overview

Many lawyers maintain that limiting the services a lawyer-accountant can provide is in the public's best interest.¹⁵⁷ They point out that lawyers are members of a regulated profession while accountants are not committed to court-approved standards of ethical and professional conduct.¹⁵⁸ This in turn feeds the concern that "a lawyer's professional judgment should not be influenced by nonlawyers who are not subject to bar standards of competence and integrity."¹⁵⁹

Rule 5.4 of the ABA Model Rules of Professional Conduct¹⁶⁰ undertakes "to

regulation of the profession").

157. *See id.*

158. *See id.*

159. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

160. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990) provides:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer is a corporate director or officer thereof; or
 - (3) a nonlawyer has the right to direct or control the professional

ensure that the lawyer will abide by the client's decisions concerning the objectives of representation and will serve the interests of the client and not those of a third party."¹⁶¹ It is but one of several rules designed to ensure that a lawyer represents the client's interests free of interference from, or obligations to, a nonlawyer who stands outside the lawyer-client relationship.¹⁶² Rule 5.4(a) "prohibits the sharing of legal fees with a nonlawyer."¹⁶³ Part (b) "prohibits the formation of a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."¹⁶⁴ Part (c) "states that a lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional [judgment] in rendering such legal services."¹⁶⁵ Finally, Rule 5.4(d) "prohibit[s] a lawyer from joining a non-lawyer in a professional corporation or association to practice law 'for a profit.'"¹⁶⁶

The purpose of the Model Rule 5.4 provisions is to safeguard the professional independence of a lawyer and guard against problems that could arise when nonlawyers assume positions of authority over lawyers.¹⁶⁷ In particular, Model Rule 5.4 seeks to prevent lay persons from interfering with a lawyer's practice.¹⁶⁸ Some believe that a lawyer's independent professional judgment can be impaired when a layman influences or controls the legal process.¹⁶⁹ After all, nonlawyers, "by definition, are not subject to the same ethical mandates regarding independence, conflicts of interest, confidentiality, fees and the other important provisions of the profession's code of conduct."¹⁷⁰

B. History of Model Rule 5.4

An examination of the history of Model Rule 5.4 indicates that the ABA's disapproval of fee sharing in lawyer-nonlawyer relationships "has been tied to the desire to prevent lay influence of a lawyer's professional judgment."¹⁷¹ "The

judgment of a lawyer.

Id.

161. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355 (1987).

162. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (client controls representation); *id.* Rule 1.7(b) (1987) (lawyer shall not represent client if representation is limited by lawyer's responsibilities to third party); *id.* Rule 1.8(f) (restricting lawyer's acceptance of compensation from third party); *id.* Rule 2.1 (1983) (lawyer shall exercise independent professional judgment).

163. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8201.

164. *Id.*

165. *Id.*

166. *Partnership with Non-lawyers*, *supra* note 42, at 91:409.

167. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

168. See *id.*

169. See *id.*

170. *Id.*

171. *Id.*

ABA's formal prohibitions against lawyer-nonlawyer partnership[s] date back to 1928, when Canon 33 was added to the Canons of Ethics.¹⁷² Canon 33 provided that "[p]artnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."¹⁷³

In addition to Canon 33, Canon 34 prohibited lawyers from splitting fees with nonlawyers.¹⁷⁴ It provided: "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."¹⁷⁵ Finally, Canon 35 warned against lawyers being influenced by lay individuals.¹⁷⁶ Canon 35 stated in part, "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."¹⁷⁷

The Model Code of Professional Responsibility¹⁷⁸ ("Model Code") replaced the Canons of Ethics in 1969.¹⁷⁹ Essentially, the Model Code built upon the Canons of Ethics, with many of the original provisions reappearing in the new Model Code. In particular, DR 3-103, DR 3-102, and DR 5-107 carried over the provisions, with minor adjustments, of Canons 33, 34, and 35 respectively.¹⁸⁰

In 1983 the ABA Model Rules of Professional Conduct ("Model Rules") revamped the Model Code.¹⁸¹ "The Model Rules were the product of almost five years of work by the Special Committee on Evaluation of Professional Standards, more commonly known as the Kutak Commission. . . ."¹⁸² The ABA House of Delegates appointed the Kutak Commission to recommend revisions to the 1969 Model Code of Professional Responsibility.¹⁸³

In 1976, the Kutak Commission proposed a version of Model Rule 5.4 that was intended "to prevent the dangers inherent in fee [splitting] without prohibiting fee sharing altogether."¹⁸⁴ As proposed, Model Rule 5.4 allowed lawyers "to share fees with nonlawyers . . . so long as the nonlawyers agreed not to influence the lawyer's independent professional judgment and to abide by the

172. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

173. ABA Comm. on Professional Ethics, Formal Op. 297 (1961).

174. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

175. ABA Comm. on Professional Ethics, Formal Op. 297 (1961).

176. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

177. ABA Comm. on Professional Ethics, Formal Op. 297 (1961).

178. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

179. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

180. See *id.*

181. See *id.*

182. Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 384 (1988).

183. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

184. *Id.*

rules of legal ethics regarding confidentiality, solicitation, and legal fees."¹⁸⁵ Proposed Model Rule 5.4 stated:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if: (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; (b) information relating to representation of a client is protected as required by [the applicable rules on confidentiality of information]; (c) the organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so . . . ; and (d) the arrangement does not result in charging a fee that violates [the applicable rules concerning fees].¹⁸⁶

"The Comment and Notes accompanying the Proposed [] Draft of the Kutak Commission's [Model] Rule 5.4 outlined the primary purpose for eliminating the traditional bans against sharing fees and forming partnerships with nonlawyers: the practice of law had changed and the rules should address the specific issues raised by the changes."¹⁸⁷ Accordingly, the proposed version of Model Rule 5.4 "permitted all forms of law practice, and all financial arrangements for providing legal services, so long as all participating lawyers met their professional responsibilities under the other professional conduct rules."¹⁸⁸ It seems the Kutak Commission intended Model Rule 5.4 to encourage the development of alternative methods of providing legal services.¹⁸⁹ However, it was probably this invitation to develop new legal services that led to the rule being rejected by the ABA.¹⁹⁰

In 1983, the ABA House of Delegates rejected the proposed rule, opting instead for an absolute ban on fee sharing.¹⁹¹ Thus, the ABA adopted the current version of Rule 5.4 of the Model Rules of Professional Conduct.¹⁹² Entitled "Professional Independence of a Lawyer," Model Rule 5.4 incorporates the traditional restrictions against lawyer-nonlawyer associations.¹⁹³

Rule 5.4(a) continued the Model Code's prohibition against lawyer-

185. *Id.*

186. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (Revised Final Draft 1982).

187. Gilbert & Lempert, *supra* note 182, at 386.

188. HAZARD & HODES, *supra* note 61, at 796.

189. *See* Gilbert & Lempert, *supra* note 182, at 386 (citing the Kutak Commission).

190. *See id.* at 388.

191. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

192. *See* *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1382 (7th Cir. 1992); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991).

193. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

nonlawyer fee splitting.¹⁹⁴ Taken directly from DR 3-102, Model Rule 5.4(a) “assumes that all fee splitting with nonlawyers *is* the unauthorized practice of law, except [under a few] narrow exceptions.”¹⁹⁵ Model Rule 5.4(b) basically reproduced DR 3-103(A)’s prohibition of lawyer partnerships with nonlawyers.¹⁹⁶ It prohibits a lawyer from sharing profits and losses of a law practice with a nonlawyer, even where the lawyer retains control over all the legal aspects of the business.¹⁹⁷ Almost identical to DR 5-107(C),¹⁹⁸ Model Rule 5.4(d) addresses the concern that an attorney’s professional judgment could be compromised as a result of business relationships with nonlawyers.¹⁹⁹

Taken together, the provisions of Rule 5.4 of the ABA’s Model Rules of Professional Conduct serve as the primary bar to lawyers employed by accounting firms performing the same types of duties as their counterparts employed by law firms. Under Model Rule 5.4, “a corporation cannot hire one or more lawyers, pay them salaries, make their services available [] to others, and directly receive the fees for the lawyers’ work.”²⁰⁰ Indeed, it was this precise scenario that led the ABA House of Delegates to adopt the current version Model Rule 5.4.²⁰¹ Virtually every state has followed suit and adopted similar or identical provisions. This, with the exception of the District of Columbia, every American jurisdiction has strict regulations, which prevent lawyers from sharing fees with nonlawyers, and essentially foreclose such arrangements.²⁰²

C. District of Columbia Model Rule 5.4

The District of Columbia (“D.C.”) is the only jurisdiction in the United States that does not bar lawyers from sharing their fees with nonlawyers.²⁰³ “The policy promoted by D.C. Rule 5.4(b) is to provide the public with the opportunity of obtaining a broad range of professional services from a single source, while not limiting nonlawyer professionals to employee status.”²⁰⁴ Comment 7 to D.C.

194. *See id.*

195. HAZARD & HODES, *supra* note 61, at 799.

196. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

197. *See* HAZARD & HODES, *supra* note 61, at 799.

198. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

199. *See* HAZARD & HODES, *supra* note 61, at 799-800.

200. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

201. *See id.*

202. *See* Balestier, *supra* note 21, at 5 (col. 2).

203. *See* Manson, *supra* note 59, at 1.

204. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991). The text of D.C. Rule 5.4(b) is as follows:

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the

Rule 5.4(b) explains:

[T]he purpose of liberalizing the rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the Rule permits . . . certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services In [such a situation], the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.²⁰⁵

D.C.'s version of Model Rule 5.4 is substantially similar to the ABA's version, except for one major difference. D.C. Rule 5.4 permits accountant-lawyer partnerships.²⁰⁶ Rather than proscribing all forms of lawyer-nonlawyer partnerships, D.C. Rule 5.4 contains provisions designed to address the concerns that arise from such pairings. For example, paragraph (c) to D.C. Rule 5.4 provides, "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."²⁰⁷ It is unfortunate that the ABA does not advocate permitting lawyers themselves to make such judgment calls.

IV. FALLACIES IN THE ABA'S POSITION

There is a spectrum of possibilities along which lawyer-nonlawyer ventures could fall.²⁰⁸ At one end of this spectrum is the ABA's position—the Model Rules.²⁰⁹ The ABA's view represents the complete prohibition of any nonlawyer

organization in providing legal services to clients, but only if:

- (1) The partnership or organization has as its sole purpose providing legal services to clients;
- (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
- (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
- (4) The foregoing conditions are set forth in writing.

D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1998).

205. *Id.* Rule 5.4, cmt. 7.

206. *See id.* Rule 5.4(b).

207. *Id.* Rule 5.4(c).

208. *See* Gilbert & Lempert, *supra* note 182, at 409.

209. *See id.*

position of authority or financial interest in a business that includes lawyers.²¹⁰ The opposite end of the spectrum would advocate a complete removal of all restrictions on lawyer-nonlawyer relationships.²¹¹ Between these extremes is a full gamut of possible lawyer-nonlawyer combinations. The D.C. approach, for instance, falls somewhere between these extremes.²¹²

Whether to permit lawyer-nonlawyer ventures is not a simple question.²¹³ On one hand, "the public is entitled to receive legal services from individuals of competence who bring an undivided loyalty to the personal relationship between lawyer and client."²¹⁴ On the other hand, D.C. Rule 5.4 rejects the "absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created."²¹⁵ Certainly the dangers inherent in permitting lawyer-accountants to practice law do not justify an absolute ban. However, in its current state, Model Rule 5.4 effectively prevents the development of a lawyer-accountant partnership that works to meet the needs of clients.

A. A Critical Look at Model Rule 5.4

Model Rule 5.4(a) deals with the sharing of legal fees with nonlawyers. Two general arguments are advanced to support this provision. The first of these arguments is that the prohibition of virtually all fee sharing arrangements ensures that the total fees paid by the client are not unreasonably high.²¹⁶ Many lawyers strenuously argue that permitting an accounting firm to set a lawyer's fees at whatever rate it chooses runs the risk of such fees becoming unreasonable.²¹⁷ After all, "[f]or-profit corporations, by definition, are motivated by anticipated profits and are concerned with the 'bottom line.'"²¹⁸

This argument is flawed in at least two respects: it suggests both that currently legal fees are not excessive and that an accounting firm would not be forced to offer competitive prices for the legal services it provided. Certainly many clients of law firms would argue that the fees they currently pay are excessive.²¹⁹ Moreover, to suggest that an accounting firm could violate basic

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

215. D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4, cmt. 4 (1998).

216. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1519 (1986).

217. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

218. *Id.*

219. *See* Amy Stevens, *The Business of Law, Lawyers and Clients*, WALL ST. J., Sept. 16, 1994, at B5 (reporting on a survey where 59% of respondents described lawyers as greedy and 63% felt they make too much money).

laws of economics and charge rates that are out of proportion with its law firm competitors is ludicrous.

First, the prudent client will always check the competitor's rates. If accounting firms were typically charging rates well in excess of legal firms for identical services, it is reasonable to conclude that accounting firms would lose business to the cheaper, yet equally as competent, law firms. Secondly, permitting accounting firms to offer legal services would likely increase efficiency by enabling the organization to address both legal and extralegal issues concurrently.²²⁰ Proponents have long believed that such a relationship would "foster competition, resulting in lower prices and more services."²²¹ As such, it would be preferable for a client to be able to receive both legal and accounting services from one provider.

The second argument in favor of Model Rule 5.4(a)—avoiding the possibility of nonlawyer interference with the exercise of a lawyer's independent professional judgment²²²—has some merit. This serves to protect clients by increasing the likelihood that they will receive competent legal services.²²³ However, the sweep of the rule is too broad as it bans "innovative forms of practice even in situations where the risk that a client will be exposed to professional incompetence is negligible."²²⁴ Again, a business arrangement made up of both lawyers and nonlawyers would benefit consumers by reducing costs and creating new services.²²⁵ A more direct approach could be employed by Model Rule 5.4(a).²²⁶ The provision could be drafted so that the establishment

220. See Edward Brodsky, *Accountants and the Practice of Law*, N.Y. L.J., Aug. 12, 1998, at 3. Furthermore, "[a]ccountants say they can deliver cheaper services more efficiently than law firms" in the first place. Gibeaut, *supra* note 11, at 44.

221. Brodsky, *supra* note 220, at 3.

222. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1519 (1986).

223. See HAZARD & HODES, *supra* note 61, at 801.

224. *Id.*

Literally applied, the rule against "sharing" of legal fees would prohibit a lawyer from remitting a fee award he received under a fee-shifting statute to an organization that had paid his salary But such a restriction bears no relation to the purposes of the rule against fee-sharing, which are to prevent the unauthorized practice of law, to prevent lay interference with a lawyer's professional judgment, and to prevent exploitation of lawyers.

Id. at n.2 (citing the holding of *American Civil Liberties Union v. Miller*, 803 S.W.2d 592, 592 n.2 (Mo. 1991)).

225. See Patricia Manson, *Panel Looks at Recipes for Practice in the Future*, CHI. DAILY L. BULL., Nov. 17, 1998, at 1 (writing that often times "[a] lawyer working with other professionals can provide better services to a business client in an age in which there no longer are 'pure' legal problems.").

226. Indeed, the exceptions contained in the current version of Model Rule 5.4(a) point to its irrationality. For example, "[i]t makes little sense to permit nonlawyers to participate in a lawyer's profit-sharing plan under [Model] Rule 5.4(a)(3), if forming a partnership between lawyers

of fee arrangements with nonlawyers would be permissible if there is no interference with the lawyer's professional judgment and the amount of the fee is reasonable.

Model Rule 5.4(b) forbids lawyer-nonlawyer partnerships if any of the activities of the partnership consist of the practice of law.²²⁷ This rule "seeks to prevent the practice of law by lay persons."²²⁸ Under Model Rule 5.4(b) a lawyer is held to aid unauthorized practice by providing legal services when, for example, a nonlawyer-employer decides whether or not to litigate on behalf of a client.²²⁹ This suggests that a lay employer would base the decision to litigate on the depth of the client's pockets rather than the merits of the case.²³⁰ However, there is no reason to assume that the lawyer could be forced to comply with such decisions.

In any event, the proscription established by Rule 5.4(b) "applies not only if a lay person attempts to participate in a traditional law firm, but also where *any* of the activities of the partnership consist of the practice of law."²³¹ Again, the policy concern is that "a lawyer's professional judgment should not be influenced by nonlawyers who are not subject to bar standards of competence and integrity."²³² However, like Model Rule 5.4(a), Model Rule 5.4(b) "establishes a flat ban where less [restrictive] means would suffice."²³³

Model Rule 5.4(c) deals with the valid concern "that a lawyer's relationship to third parties may interfere with the independence of his legal advice."²³⁴ However, this concern is already generally addressed in Model Rule 1.7(b),²³⁵

and nonlawyers is prohibited under [Model Rule] 5.4(b)." HAZARD & HODES, *supra* note 61, at 801-02.

227. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1990); *see also supra* note 151 and accompanying text.

228. HAZARD & HODES, *supra* note 61, at 804.1.

229. See, e.g., Kentucky Bar Ass'n v. Tiller, 641 S.W.2d 421 (Ky. 1982).

230. Of course, no attorney would tailor his or her representation to the finances of the employer. For example, no attorney has ever unnecessarily drawn out the litigation/settlement process merely because he or she represented, say, an insurance company.

231. HAZARD & HODES, *supra* note 61, at 804.1.

232. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

233. HAZARD & HODES, *supra* note 61, at 804.1.

234. *Id.* at 807.

235. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1987).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks

and is more specifically addressed in Model Rule 1.8(f),²³⁶ dealing with situations in which a third party pays a client's bill.²³⁷ In truth, there is probably little harm in this redundancy, and indeed, this provision should alleviate some of the concerns that its two preceding provisions are purportedly designed to address.

Model Rule 5.4(d) "is designed to prevent business relationships with nonlawyers from compromising a lawyer's independence of thought and action."²³⁸ The general rule is that a lawyer may practice with, or in the form of, a professional corporation if the arrangement is consistent with the lawyer's ethical responsibilities and complies with other law. However, Model Rule 5.4(d) prohibits nonlawyer ownership or management of a for-profit professional corporation or association.²³⁹ The fallacy inherent in Rule 5.4(d) is that "if a nonlawyer owns an interest in, or is an officer of a legal organization, the lawyer's position *must* be compromised."²⁴⁰ However, in truth, this provision is not ultimately responsible for the prohibition on accounting firms employing attorneys to practice law.

At the heart of Model Rule 5.4 is the protection of the client. However, "[i]f the unauthorized practice rules are truly intended to protect clients, clients should have some say as to how much protection they want. If the rules are partly designed to protect lawyers, then lawyers should not be allowed to determine the degree of their own protection."²⁴¹ "Times are changing and people's

involved.

Id.

236. *See id.* Rule 1.8(f) (1987).

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client consents after consultation;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.

Id.

237. *See* HAZARD & HODES, *supra* note 61, at 807.

238. *Id.* at 808.1.

239. *See, e.g.,* Florida Bar v. Hunt, 429 So. 2d 1201 (Fla. 1983) (disbarring a lawyer for designating nonlawyers as corporate officers and directors of professional association); Florida Bar v. Budish, 421 So. 2d 501 (Fla. 1982) (disciplining a lawyer for employing nonlawyer as president of legal clinic); Florida Bar v. Shapiro, 413 So. 2d 1184 (Fla. 1982) (disciplining a lawyer for electing a nonlawyer as secretary of law clinic). *See also* Gilbert & Lempert, *supra* note 182, at 409 (suggesting that "[i]t was the specter of nonlawyer investment in law firms that sent the ABA House of Delegates running to the far end of the spectrum, an absolute ban.").

240. HAZARD & HODES, *supra* note 61, at 808.1.

241. *Id.* at 813.

requirements for legal services are evolving.”²⁴² Indeed, “[c]orporate clients, far from worrying about ethical potholes, are delighted that they can finally find tax and legal advice from a unified team.”²⁴³ As the market for legal services grows, attorneys are finding it increasingly difficult to justify the legal monopoly they currently enjoy by arguing Model Rule 5.4 protectionism. These attorneys are now invoking additional policy arguments in the hope of retaining their exclusive possession of the legal market.

B. Accountant Client Privilege

Perhaps the bar’s best “consumer-oriented argument” is that while accountants may charge less and work faster, they cannot offer broad-ranging confidentiality to their clients or the protections those duties are designed to guarantee.²⁴⁴ However, rather than celebrate the victory of the client, “many lawyers reacted with dismay . . . as a provision recognizing an accountant-client privilege in tax matters became law as part of a bill overhauling the Internal Revenue Service.”²⁴⁵ Many attorneys viewed the recognition of the accountant-client privilege as the beginning of a slippery slope that ultimately could threaten their virtual monopoly on providing legal services.²⁴⁶ Indeed, the ABA opposed extension of the privilege, and many lawyers, particularly those practicing tax law, viewed it as the latest encroachment by nonlawyers into activities that they have traditionally handled.²⁴⁷

On July 22, 1998 President Clinton signed into law the Internal Revenue Service (“IRS”) Restructuring and Reform Act of 1998.²⁴⁸ The bill “is intended to make the IRS operate more efficiently [while providing Americans with] greater protection against potential government abuse.”²⁴⁹ Among other provisions, the bill created a limited confidentiality privilege for communications between taxpayers and “federally authorized tax practitioners”²⁵⁰ concerning tax

242. Manson, *supra* note 225, at 1 (quoting Colin Garrett, Letter to ABA (Aug. 23, 1998)).

243. Segal, *supra* note 19, at F7.

244. See Gibeaut, *supra* note 11, at 47; see also Desloge, *supra* note 3, at 26 (paraphrasing Thomas Walsh as saying that “clients need to understand [the] fundamental differences between the two professions’ approach to business. The relationship with a lawyer is confidential, and [as such] the lawyer has limited obligations to disclose information [while] [a]ccountants are more bent toward disclosure because they have an obligation to all shareholders.”).

245. Balestier, *supra* note 21, at 5 (col. 2).

246. See *id.*

247. See generally *Unauthorized Practice: ABA President Creates Commission to Review Multidisciplinary Practice Issues*, 15 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 390, 390-91 (Aug. 19, 1998).

248. See Michael Arbogast, *New Legislation May Reform IRS*, FLA. TODAY, Oct. 18, 1998, at 03E.

249. Elizabeth MacDonald, *IRS Bill Gives Accountants New Privileges*, WALL ST. J., June 26, 1998, at A4.

250. See I.R.S. Treasury Department Circular No. 230 (Rev. 7-94) (defining “practitioner”

advice. This is known as the new accountant–client privilege.

“Previously, accountants [had] only received a privilege protection if they worked as an agent of the client’s attorney.”²⁵¹ If an accountant was retained directly, communications were not confidential.²⁵² Thus, prior to the IRS Restructuring and Reform Act of 1998, attorneys were the only representatives who could shield tax-preparation advice from the IRS.²⁵³ Now, the consulting relationship between taxpayers and accountants is more like the relationship between taxpayers and their attorneys.

The IRS Restructuring and Reform Act of 1998 does not “represent a complete victory for accountants.”²⁵⁴ For example, the new confidentiality privilege is not as broad as the attorney-client privilege.²⁵⁵ In particular, the privilege only applies to “IRS civil cases and not criminal cases or state tax matters.”²⁵⁶ Nevertheless, the new provision will provide accountants an opportunity to make inroads into tax practice.²⁵⁷ Furthermore, the legal community’s disdain indicates that perhaps the legal profession has some further motivation for maintaining their current monopoly on providing legal services.

C. *Morality v. Money*

Many in the legal profession maintain that they are protecting clients rather than turf.²⁵⁸ These attorneys contend that their monopoly on legal services is necessary because competition would inevitably degrade the standards of ethical behavior.²⁵⁹ While this is indeed a valid concern, it makes little sense to assume that a lawyer will ignore ethical mandates simply because he or she is employed by an accounting firm. An attorney does not cease to comprehend professional ethics the moment he or she decides not to work for a traditional law firm. Additionally, the conclusion that lay employers will attempt to assert undue influence on their attorney-employees does not necessarily flow from this asserted premise. In other words, it is erroneous to conclude that merely because an accountant herself is not subject to bar standards she will not respect that attorneys performing legal work are. Certainly a manager at an accounting firm recognizes that lawyers are subject to obligations and constraints that other

as: (a) Attorney; (b) Certified Public Accountant; (c) Enrolled Agents; or (d) Enrolled Actuaries).

251. Anna Snider, *Lawyers Wary of Accountant-Client Privilege*, N.Y. L.J., July 17, 1998, at 1.

252. *See id.*

253. *See* MacDonald, *supra* note 249, at A4.

254. *Id.*

255. *See id.*; *see also* Arbogast, *supra* note 248, at 03E; Lisa Stein, *Accountants Get Privilege in Tax Bill*, NAT’L L.J., July 6, 1998, at B1.

256. MacDonald, *supra* note 249, at A4.

257. *See id.* (reporting that new IRS bill gives “accountants a powerful marketing tool in their battle to win tax clients away from attorneys”); Snider, *supra* note 251, at 1.

258. *See* Segal, *supra* note 19, at F01.

259. *See id.*

business professionals are not.²⁶⁰

This is not intended to suggest that no lawyer-accountant would ever feel pressure to refer business to his or her nonlawyer partners, even though outside professionals might be better suited for a client's needs. Nor should this be interpreted to imply that no manager will ever attempt to compel an attorney to engage in a course of action that benefits the company rather than the client. Rather, this is intended to demonstrate that branding all laypersons as unscrupulous is a gross overgeneralization. Such an argument implies that all lawyers are honest, and everyone else is not. The simple fact is that not all lawyers are honest, while plenty of laypersons are. Despite this, current law discounts the notion that many laypersons can understand and do respect a lawyer's ethical obligations.

Thus, while the legal profession's concerns are legitimate, its approach is infelicitous. This suggests that perhaps ulterior motives underlie the legal community's prohibition on lawyer-accountant partnerships, namely economic protectionism.²⁶¹ Such a self-serving interest is disreputable for a profession that insists on its adherence to ethical standards. Furthermore, economic protectionism has no place in today's global marketplace.

"In our law-dominated society, almost every significant financial decision has at least some legal element to it"²⁶² Clearly, it makes little sense to confine the rendering of legal services to law firm attorneys. Lawyer-accountants are just as qualified as their law firm counterparts and are likely to have superior resources at their disposal. Accordingly, consumers should be permitted to decide the matter for themselves, based on who can provide the best services for the most reasonable price.²⁶³

260. See Gilbert & Lempert, *supra* note 182, at 406.

[I]f lay owners or managers understand the ethical obligations imposed upon attorneys and appreciate that policies or practices impinging upon these obligations are improper, why should lay persons be completely banned from owning or managing a legal enterprise? Surely, persons other than lawyers can understand that lawyers have obligations and constraints placed upon them that are not placed on other businessmen and professionals.

Id.

261. See Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978) (Karl, J., concurring) (stating that a small number of "attorneys who advocate a broad definition of the practice [of law] coupled with severe penalties for those who encroach are motivated by economic self-interest."); HAZARD & HODES, *supra* note 61, at 799 (writing that the broad language of Model Rule 5.4, where narrow language would have sufficed, suggests economic protectionism was the actual rationale); Desloge, *supra* note 3, at 26 (reporting that "attempts to keep accountants from taking on legal work are viewed as [economic] protectionism").

262. HAZARD & HODES, *supra* note 61, at 814.

263. Of course, there are additional considerations as well. Nevertheless, for tax services, clients are likely to opt for accounting firms. See Geoffrey C. Hazard, *The Ethical Traps of Accounting Firm Lawyers*, NAT'L L.J., Oct. 19, 1998, at A27 (writing that "accountants have more acceptable fee schedules, avoid legalese, do the work promptly, and are otherwise more user-

In fact, resolution of the current dissonance may be "driven less by lawyers' own notions of ethical propriety than by the demands of clients in the modern global marketplace."²⁶⁴ Many clients who engage accounting firms also engage law firms.²⁶⁵ The client should be able to decide whether it is in his or her best interest to receive both types of services from the same provider. Why impose on the public outdated ideals of protectionism that it no longer needs or wants? Public interest may demand that legal services should be provided by those best qualified to do so, but it should be of little importance whence those legal service originate. Said one commentator, "I doubt whether it is really relevant to the client in most cases whether the lawyer is employed by Cravath, Swaine & Moore in N.Y.C., by Schmucker & Schmucker in Hicksville, by Arthur Andersen in Chicago or by Wal-Mart."²⁶⁶ Indeed, consumers may never perceive lawyer-accountants as practicing law.²⁶⁷

CONCLUSION

Due to lack of case law, it is unclear whether the current version of Model Rule 5.4 prevents lawyers who work for accounting firms from performing so-called consulting services.²⁶⁸ On the one hand, the restrictions in the Model Rules concerning lawyer-accountant partnerships have survived "despite several years of discussions by state bar committees concerning multiprofessional offices."²⁶⁹ On the other hand, it seems likely that courts are willing to accept accounting firms' definition of consulting for two reasons: the IRS has given its blessing and clients seem to prefer it.²⁷⁰ Changes are likely to continue as clients demand more services from their accountants.²⁷¹ Indeed, the Big Five are already

friendly").

264. Balestier, *supra* note 21, at 5; *see also* Karen Lawrence, *Crossing Professional Borders*, PITTSBURGH BUS. TIMES & J., Nov. 2, 1998, at 1 (reporting that clients are the driving force behind law firm and accounting firm competition); Segal, *supra* note 19, at F1 (reporting that experts believe the market could decide the issue on its own).

265. *See* Henderson, *supra* note 4, at E8 (reporting on a survey showing that 60% of 350 law firm client surveyed also engaged accounting firms).

266. Manson, *supra* note 225, at 1 (quoting Colin Garrett).

267. *See* Desloge, *supra* note 3, at 34 (quoting Art Bowman and pointing out that lawyer-accountants "won't be chasing ambulances").

268. *See* Gibeaut, *supra* note 11, at 44.

269. Morello, *supra* note 55, at 195.

270. *See* Hazard, *supra* note 263, at A27; *see also* Balestier, *supra* note 21, at 5 (noting in addition that these issues "are compounded by the sheer difficulty in attempting to define the practice of law in an age where many disciplines are called into play on various parts of a project").

271. *See* Desloge, *supra* note 3, at 34.

informally considered the world's largest law firms.²⁷² Accordingly, the legal community should stop hiding behind its pretentious veil of ethics and start looking for ways to compete.

272. See Binole, *supra* note 3, at 4; Segal, *supra* note 19, at F1; see also Goodman, *supra* note 7 (reporting that there is a movement to rewrite the laws that prohibit law firms from mingling their business with accounting and consulting firms).

STATE ELECTRIC RESTRUCTURING: ARE RETAIL WHEELING AND RECIPROCITY PROVISIONS CONSTITUTIONAL?

KELLEY A. KARN*

INTRODUCTION

*"It is one of the happy incidents of the federal system that a single courageous state, may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."*¹

These words by Justice Brandeis hold true today as states experiment on issues ranging from public welfare reform to tort reform, resisting federal mandates. So too, every state in the union is thinking about, talking about, and implementing changes in the way its citizens will receive electric service.² To date, twenty-four states have taken final action on "experimental" legislation or regulation that restructures the retail electric industry.³

This Note discusses the constitutional problems states are facing as they try to insert competition into the retail electric industry. In particular, the federal preemption and dormant commerce clause challenges that may be made to four states' electric restructuring plans are examined.⁴ Illinois,⁵ Michigan,⁶ Montana,⁷ and Oklahoma⁸ have electric restructuring plans that require the retail wheeling of electricity and retail reciprocity from out-of-state utilities.

Retail wheeling occurs when electricity produced by one utility is wheeled to a customer in a second utility's service area across the power lines of the

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. *See* Edison Electric Institute, *Retail Wheeling & Restructuring Report: State Profiles* (1998) (visited Jan. 31, 2000) <http://www.eei.org/7online/online/rwrr/profiles/_states.htm> (listing retail electric restructuring actions taken by all 50 states) [hereinafter *States Profiles*].

3. *See id.*

4. There are constitutional challenges on both sides of many state electric restructuring plans. There may be further constitutional challenges to these four states' retail wheeling and reciprocity clauses including equal protection challenges and possibly privilege and immunity clause challenges, however, those are beyond the scope of this Note.

5. *See* Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILL. COMP. STAT. 5/16-101-5/17-600 (West 1997).

6. *See In re Restructuring of the Electric Utility Industry*, 177 Pub. Util. Rep. (PUR4th) 201 (Mich. Pub. Serv. Comm'n 1997).

7. *See* Electric Utility Industry Restructuring Act and Customer Choice, MONT. CODE ANN. § 69-8-101 (1997).

8. *See* Electric Restructuring Act of 1997, OKLA. STAT. tit. 17, § 190.1 (1997), and amendments at 1997 Okla. Sess. Laws 888.

second utility and any intermediate utilities.⁹ Allowing or requiring retail wheeling at a fair and nondiscriminatory transmission price encourages competition in electric supply and generation.¹⁰ The four states' electric restructuring plans require retail wheeling because without it there can be no customer choice of electric supplier. States must require utilities who own distribution and transmission systems to allow nondiscriminatory open access to their systems. Still, some argue that only the federal government has the power to order utilities to wheel electricity in this way and that states are preempted by the Supremacy Clause.¹¹ This Note concludes that the federal government has not preempted the states in the area of retail wheeling of electricity.

Even more controversial are the four states' reciprocity provisions. Essentially, if an out-of-state utility wants to serve retail customers in one of these four states, the out-of-state utility must allow reciprocal access to its own distribution lines. Thus, the in-state utility whose customers the out-of-state utility is taking away, will have an opportunity to serve customers in the out-of-state utility's territory. In other words, "you can't sell electricity in my territory unless I have an opportunity to sell in yours." The reason for this requirement is fairly obvious. For example, if Illinois is an open access state and Indiana is not, then Indiana utilities could enter Illinois and supply electricity to the major Illinois customers, leaving the Illinois utilities with less revenue and no access to new customers.

Because traditional dormant Commerce Clause analysis prohibits discrimination against out-of-staters,¹² these states' reciprocity clauses are subject to Commerce Clause¹³ challenges.

Part I of this Note gives a brief history of electricity regulation and the move from monopoly to competition. Part II discusses the claimed federal preemption of retail electric wheeling. In Part III, after a brief history of the dormant Commerce Clause, the four states' reciprocity requirements are examined under traditional dormant Commerce Clause analysis. Then, Part III drafts a reciprocity clause that will pass dormant Commerce Clause scrutiny. Additionally, an argument that the unique nature of the electric industry requires deviation from traditional dormant Commerce Clause analysis is suggested. Part IV examines possible federal solutions to the problem, including an analysis of the policy considerations involved.

This Note concludes that as states experiment with different policies and structures for the retail electric industry, the federal government should step to the side, monitor the experiments, and, when necessary, give states the power needed to ensure that the transition from monopoly to competition will be fair.

9. See MASAYUKI YAJIMA, DEREGULATORY REFORMS OF THE ELECTRIC SUPPLY INDUSTRY 12 (1997).

10. See *id.*

11. U.S. CONST. art. VI.

12. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 307-08 (1997).

13. U.S. CONST. art I, § 8.

I. THE MOVE FROM MONOPOLY TO COMPETITION

The electric industry is changing from a highly regulated monopoly structure to a combination of monopoly and competitive market. Traditionally, all three functions of the industry—generation, transmission, and distribution—were thought to be natural monopolies.¹⁴ However, slowly and consistently competition has entered the electric industry. The current consensus is that the generation or supply of electricity can be competitive, while the transmission and distribution functions must remain monopolies.¹⁵ William Massey, the Commissioner of the Federal Energy Regulatory Commission (the “FERC”), declared in a recent speech that the only way for the electric industry to proceed is to aggressively move forward toward a competitive but fair electricity generation market.¹⁶

Competition in electricity generation began in the wholesale energy markets which, because of its interstate commerce implications, is governed by federal laws enforced by the FERC.¹⁷ The retail sale of electricity, which has remained highly monopolistic until recently, is regulated by individual state laws enforced by a public utility commission.¹⁸

Competition was inadvertently inserted into the wholesale electric generation market with the passage of Title II of the Public Utility Regulatory Policy Act of 1978 (“PURPA”).¹⁹ Congress passed PURPA in the midst of a national energy crisis; its intent was to promote efficient energy generation and the conservation of resources.²⁰ The law required electric utilities to buy wholesale power produced from new production methods—cogeneration and renewable energy—from certain qualifying facilities (“QFs”).²¹ The electric utilities must also allow the QFs to use the electric utilities own transmission lines.²²

Competition in the wholesale electric market was further increased through the passage of the Energy Policy Act of 1992 (“EPAct”).²³ The EPAct gave the Federal Energy Regulatory Commission (the “FERC”) more power to order

14. See YAJIMA, *supra* note 9, at 1.

15. See *id.*

16. See William L. Massey, *FERC at the Crossroads: Move Backward, Tread Water, or Move Forward*, POINTCAST, ENERGY NEWS, ¶ 25 (last modified Nov. 5, 1998) <<http://127.0.0.1:15841/v1?catid=20054275&md5+falc4104fef602222c43878c21ad0ff5>>.

17. See The Federal Power Act of 1935, 16 U.S.C. § 791a (1994).

18. See *id.*

19. 16 U.S.C. § 824a-3 (1994).

20. See YAJIMA, *supra* note 9, at 73.

21. See Jon R. Mostel, *Overview of Electric Industry Bypass Issues*, 37 NAT. RESOURCES J. 141, 149 (1997).

22. See *id.*

23. Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified in scattered titles of U.S.C., 16 U.S.C. § 824k (1994)).

wholesale electric wheeling.²⁴ The FERC took this new authority and issued Orders 888 and 889, which required electric public utilities to set wholesale open access transmission tariffs and established an electronic information sharing system to encourage the competitive sale of wholesale electricity, respectively.²⁵ Electric utilities have met the challenge, and a vibrant wholesale power market has developed.

With the success of wholesale electric generation and supply competition, states began to consider inserting competition into the retail sale of electricity.²⁶ The hope is that electricity prices will decrease due to competitive innovations and efficiencies. Yet, with these state-by-state initiatives come several constitutional questions, some of which are discussed below.

II. FEDERAL PREEMPTION OF RETAIL WHEELING

States that desire retail electric competition have mandated the retail wheeling of electricity to allow alternative electricity suppliers access to retail customers in areas where the supplier does not own any transmission or distribution lines.²⁷ A local utility must provide access to its transmission and distribution system to other electric suppliers so that a retail electric customer will have a choice of suppliers.²⁸ However, if the alternative electric supplier is from out-of-state, then interstate commerce is implicated, and the issue of federal preemption must be addressed.

The question then is whether the area of retail wheeling has been preempted by the federal government, or whether states retain the authority to compel retail wheeling. Because no federal statute expressly prohibits states from ordering retail wheeling, this Note examines whether implied federal preemption exists in the area of retail wheeling.

A. Federal/State Jurisdiction in the Electric Industry

Initially, all electricity regulation was done by the states. However, the watershed case of *Public Utilities Commission v. Attleboro Steam & Electric Co.*²⁹ severely limited a state utility commission's power over electricity that flowed interstate. In *Attleboro*, Narragansett Company, a Rhode Island electric utility, had a twenty-year full-requirements contract to sell electricity to Attleboro Company, a Massachusetts electric utility.³⁰ Seven years into the contract, Narragansett Company filed a petition with the Public Utilities Commission of Rhode Island to increase the electric rates that it charged Attleboro Company. After a hearing, the rate increase was approved as in the

24. See 16 U.S.C. § 824k (1994).

25. See YAJIMA, *supra* note 9, at 81.

26. See *id.*

27. See *id.*

28. See *id.* at 12.

29. 273 U.S. 83 (1927).

30. See *id.* at 84.

public interest of the people of Rhode Island.³¹ However, on appeal the Court held that the sale of electricity across state lines was a direct burden on interstate commerce, and thus the Public Utilities Commission of Rhode Island could not impose the rate increase.³²

Thus, the *Attleboro* gap was created. States could only regulate the electric rates of intrastate sales, not those sales that occurred in interstate commerce and were national in character.³³ With the growth of technology, the sale of electricity in interstate commerce increased, with no regulatory supervision.

Congress stepped in to fill the regulatory gap with the Federal Power Act of 1935 ("FPA").³⁴ The FPA created the Federal Power Commission (now the "FERC")³⁵ to regulate "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce. . . ."³⁶ The FPA was enacted to codify the bright-line test set out in *Attleboro*; the federal government would regulate interstate wholesale sales of electricity, while the individual states would continue to regulate the retail sale of electricity.³⁷ Specifically, the FPA limited federal regulation to areas that were not subject to state regulation.³⁸

However, over the years, the federal regulation of electricity (through the FERC) primarily has increased by expanding the meaning of *interstate* transmission of electricity. In *Federal Power Commission v. Southern California Edison Co.*³⁹ the Supreme Court found that a sale of electricity from one utility in California to another utility in California was a sale in interstate commerce for resale, and as such the sale was under federal jurisdiction.⁴⁰ The electricity sold included some electricity that was generated out-of-state; thus, even though the sale took place entirely within California, interstate commerce was involved, and the FERC had jurisdiction.⁴¹

Later, the Court upheld federal jurisdiction when a Florida utility was only indirectly connected to an out-of-state utility's power lines through the power lines of another Florida utility.⁴² The Court found that once power enters a transmission grid that is interconnected to facilities outside of the state, the

31. See *id.* at 86.

32. See *id.* at 90.

33. See *id.*

34. 16 U.S.C. § 791a (1994).

35. In 1950 the Federal Power Commission was terminated and its functions were transferred to the FERC. Reorg. Plan No. 9 of 1950, 16 U.S.C. § 792, set out as noted under this section (1950). For clarity sake, all references in this Note will be to the FERC.

36. 16 U.S.C. § 824(a).

37. See Peter C. Lesch et al., *Preemption*, 5 ENERGY L. & TRANSACTIONS (MB) § 144.02[1] (1998).

38. See 16 U.S.C. § 824(a).

39. 376 U.S. 205 (1964).

40. See *id.* at 210.

41. See *id.* at 208.

42. See *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453 (1972).

power is transmitted in interstate commerce.⁴³

Today, virtually all electric utilities are connected to out-of-state power lines in an interconnected grid. So, most of the power that is generated in the United States crosses state borders at one time or another.⁴⁴ Thus, unless the utility can prove that no out-of-state power was commingled with the power sold at wholesale, then the FERC has jurisdiction over the sale.

However, the bright-line distinction between wholesale and retail sales—the FERC controlling wholesale sales and state commissions' controlling retail sales—did not endure unscathed. In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*,⁴⁵ the Supreme Court allowed the Arkansas Public Service Commission to regulate the wholesale electric rates that the Arkansas Electric Cooperative Corporation ("AECC") charged to its member cooperatives. AECC was a member-owned cooperative, funded by the federal Rural Electrification Administration ("REA"), which generated and sold electricity to distributor cooperatives, which, in turn, sold it at retail to ultimate customers.⁴⁶ However, the FERC held that it did not have jurisdiction over such cooperatives under the supervision of the REA.⁴⁷ The question remained, whether a state commission could then regulate the electric cooperative's wholesale rates or whether the state was preempted by the Federal Power Act or the Rural Electrification Act.⁴⁸

The Court concluded that nothing in the Federal Power Act indicated that this was an area best left unregulated.⁴⁹ "Congress's purpose in 1935 was to fill a regulatory gap, not to perpetuate one."⁵⁰ Thus, because neither the FERC nor the REA regulated the electric cooperative's rates, the state could do so, even though the sale of electricity was at wholesale.

B. Current Jurisdiction over Retail Wheeling

There is considerable disagreement about whether the states have jurisdiction over retail wheeling initiatives. An examination of the FERC decisions, federal electric legislation, and court decisions illuminate the matter. In *Florida Power & Light Co.*,⁵¹ the FERC determined that it, and not the state commission, had jurisdiction over the terms, conditions, and rates for wheeling power produced by cogenerators or small power producers even when the sender and receiver of power were located within the same state.⁵²

43. See *id.* at 461.

44. See *id.* at 471 (Douglas, J., dissenting).

45. 461 U.S. 375 (1983).

46. See *id.* at 380-81.

47. See *id.* at 381-82.

48. See *id.* at 383-84.

49. See *id.* at 384.

50. *Id.*

51. 40 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,045, ¶61,121 (1987).

52. See *id.*

With this expansive reading of what “transmission of electricity in interstate commerce” meant, it would seem that the FERC would have control over all transmission within or without a particular state, and thus, over retail wheeling. However, in 1992, Congress limited the FERC’s jurisdiction over retail wheeling with the passage of the Energy Policy Act (“EPAAct”).⁵³ Section 212(h) of the FPA as amended by the EPAAct provides:

Prohibition on mandatory retail wheeling and sham wholesale transactions.

No order issued under this chapter shall be conditioned upon or require the transmission of electric energy: (1) directly to an ultimate customer, or (2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate customer. . . . Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.⁵⁴

Thus, only under certain limited circumstances, not relevant here, can the FERC order direct retail wheeling. The EPAAct contains no comparable provision for the states and, in fact, adds a provision protecting the authority of the states over the transmission of electric energy to ultimate customers.⁵⁵

The FERC’s Order 888, which set the stage for electric wholesale competition, addressed the FERC’s wheeling authority.⁵⁶ The FERC claimed authority over the rates, terms, and conditions of unbundled transmission service in interstate commerce.⁵⁷ However, pursuant to the FPA the states retained authority over local distribution service.⁵⁸ Some utilities argued that the states have jurisdiction over all aspects of retail sales, including unbundled retail transmission service.⁵⁹ Some states argued that the FERC and state commissions had concurrent jurisdiction over unbundled transmission service.⁶⁰ However, the FERC asserted jurisdiction over the transmission component of retail wheeling transactions while recognizing that it had no authority to order retail wheeling under the EPAAct.⁶¹ Yet, the FERC did not address whether states had the

53. 16 U.S.C. § 824k (1994).

54. *Id.*

55. *See id.*

56. Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Stats. & Regs. (CCH) ¶31,036 at 31,770, 61 Fed. Reg. 21,540 (1996) (codified at 18 C.F.R. §§ 35, 385 (1999)) [hereinafter *Order 888*].

57. *See id.* Unbundled transmission service means transmission service that is separated from the supply of electricity and the distribution of electricity. Thus, the transmission charge only includes charges for the transmission function, not the electric generation or distribution functions.

58. *See id.* at 31,770-71.

59. *See id.* at 31,772.

60. *See id.* at 31,775.

61. *See id.* at 31,780-81.

authority to order retail wheeling but stated that, "if unbundled retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail access program, [the FERC] has exclusive jurisdiction.

...⁶²

Furthermore, in Order 888's rehearing, the FERC clarified that it could order *indirect* unbundled retail transmission service while recognizing that it could not order retail wheeling directly to an ultimate customer or sham wholesale transactions.⁶³ Yet, the FERC implied that states may order retail wheeling, noting that when the FERC was prohibited by section 212(h) of the EPAct from ordering retail wheeling, then "entities are eligible for such service under the tariff only if it is provided pursuant to a *state requirement* or is provided voluntarily."⁶⁴ Furthermore, the FERC stated that retail customers taking unbundled transmission service under a state requirement are only eligible for transmission service from those providers that the state *orders* to provide service.⁶⁵

Thus, despite the FERC's assertion of jurisdiction over unbundled retail transmission service, even it recognized the limits to its authority, namely section 212 (h) of the EPAct, and implied that states may be able to order direct retail wheeling.⁶⁶ The FERC recognized that states retain jurisdiction over local distribution to ultimate customers under the FPA and even stated that when no local distribution facilities are identified, states still retain jurisdiction over "the service of delivering electric energy to end users."⁶⁷

C. Analysis of Federal Preemption of Retail Wheeling

A federal law or regulation may preempt state laws by implication in three ways: (1) The federal government could have preempted the entire field of regulation, leaving no room for state regulation; (2) there may be a conflict between federal and state law, where compliance with both is impossible; or (3)

62. *Id.* at 31,781.

63. See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888-A (Rehearing), 78 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,220, 1997 FERC LEXIS 463, *16 (Mar. 4, 1997).

64. *Id.* at *17 (emphasis added).

65. See *id.*

66. 16 U.S.C. § 824k (1994). The FERC's authority under Order 888 has been challenged in other ways. In *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), the court found that the FERC could not require a utility to curtail its retail bundled load on a nondiscriminatory basis with its wholesale load because the FERC did not have jurisdiction over bundled retail electric sales. Also, an omnibus appeal of the FERC's Order 888 is pending. See *id.* at 1096.

67. Order 888, *supra* note 56, at 31,783; see also Barbara S. Jost, *Leveling the Playing Field—Can Retail Reciprocity Work?*, 11 NAT. RESOURCES & ENV'T 55, 57 (Spring 1997).

the state law may impede the achievement of a federal objective.⁶⁸ In any case, federal preemption is a matter of congressional intent, which can be found in the language, structure, and purpose of federal legislation or regulations.⁶⁹

The jurisdictional dispute over electricity is clear. The FPA gave the federal government jurisdiction over electric transmission in interstate commerce and the sale of energy at wholesale in interstate commerce.⁷⁰ Interstate commerce has been expanded to include virtually all transmission of electricity.⁷¹ Yet, the states retain jurisdiction over generation, local distribution, and transmission of electric energy in intrastate commerce.⁷² The FERC is prohibited from ordering retail wheeling to a direct customer, while the states are not expressly prohibited from or expressly authorized to do so.⁷³ In addition, the EPAct provides that states retain the authority over transmission of electric energy directly to an ultimate customer.⁷⁴

Many, particularly the states, argue that retail wheeling is an area of state concern because the FERC is banned from ordering it and states are not. However, there could be a federal legislative decision that retail wheeling should not be ordered at all, by anyone. That argument is relatively weak considering the addition of the saving clause in the EPAct, which leaves intact state authority over transmission to ultimate customers.⁷⁵ Yet, the saving clause could be read to preserve for states only the jurisdiction they had over transmission before the 1992 EPAct revisions.⁷⁶ This would not include jurisdiction over retail wheeling. While it is true that Congress did not declare that "States shall have authority over all transmission to ultimate consumers,"⁷⁷ it is also true that Congress did not say "States are prohibited from ordering retail wheeling transactions." Either statement could have easily been made. Neither statement being made by Congress may imply a legislative decision to allow FERC and the states to work together to determine the best result.⁷⁸

The only court or utility commission decisions on the federal preemption matter have determined that states are not preempted from ordering retail wheeling.⁷⁹ In *Detroit Edison Co. v. Michigan Public Service*

68. See CHEMERINSKY, *supra* note 12, at 286.

69. See *id.* at 285.

70. See 16 U.S.C. § 824 (1994).

71. See *supra* notes 39-44, 51-52 and accompanying text.

72. See 16 U.S.C. § 824 (b) (1).

73. See *id.* § 824k (h).

74. See *id.*

75. See *id.*

76. See Kyle Chadwick, *Crossed Wires: Federal Preemption of States' Authority over Retail Wheeling of Electricity*, 48 ADMIN. L. REV. 191, 195 (1996).

77. *Id.*

78. By limiting the FERC's jurisdiction, Congress ensured room for the states to take an active part in retail wheeling.

79. See *Detroit Edison Co. v. Michigan Public Serv. Comm'n*, 575 N.W.2d 808 (Mich. Ct. App. 1998), *rev'd on other grounds*, 596 N.W.2d 126 (Mich. 1999); *Energy Assoc. v. Public Serv.*

Commission,⁸⁰ the state's retail wheeling pilot program was not preempted. The court found that the EPAct saving clause, along with evidence that the FERC itself was willing to cooperate with states that implemented retail wheeling experiments, proved that states retained the authority to order retail wheeling.⁸¹

Further evidence that states can order retail wheeling is found in *Consumers Energy Co.*⁸² The FERC dismissed an application for a direct retail tariff because the facilities involved were in local distribution, an area over which the FERC had no jurisdiction.⁸³ Thus, states should be free to implement retail wheeling programs due to states' jurisdiction over local distribution.

Also, in *Energy Ass'n of New York v. Public Service Commission of New York*,⁸⁴ the court found that the New York Public Service Commission was not preempted by federal law from effectuating retail wheeling. Again the court relied on the savings clauses contained in the EPAct.⁸⁵

The Connecticut Department of Public Utility Control ("DPUC") also agreed that it was not preempted by federal law from ordering retail wheeling. In *DPUC Investigation into Retail Electric Transmission Service*,⁸⁶ the DPUC argued that even though some of the electricity used by an in-state utility came from out-of-state, that is "true of most retail utilities, and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States."⁸⁷ The DPUC claimed that legislative intent was to give states authority over the sale of electricity to an ultimate customer, and thus, the states have authority over retail wheeling to such ultimate customers.⁸⁸

Based on these decisions, the states believe that they have the authority to order retail wheeling and have done so. The FERC seems to accept this to a certain extent, though the FERC is quick to assure its authority over transmission in interstate commerce, be it retail or wholesale. While the federal government through the FERC is heavily involved in the electric regulation field, the FPA as amended by PURPA and the EPAct, explicitly leaves areas of regulation for the

Comm'n, 653 N.Y.S.2d 502 (N.Y. Sup. Ct. 1996); DPUC Investigation into Retail Electric Transmission Service, Docket No. 93-09-29, 1994 Conn. PUC LEXIS 1 (Connecticut Department of Public Utility Control 1994).

80. *Detroit Edison Co.*, 575 N.W.2d at 813 (stating that the Michigan utility commission does not have the statutory authority to order retail wheeling. The Court did not decide the issue of whether the state was preempted by the federal government by ordering retail wheeling.).

81. *See id.* at 814.

82. 80 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,121 (1997).

83. *See id.*

84. 653 N.Y.S.2d 502 (1996).

85. *See id.* at 511. The court relies on the saving clause contained in section 212 (h) and on section 212 (g) which provides: "No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities." 16 U.S.C. § 824k (g) (1994).

86. No. 93-09-29, 1994 WL 454686, at *1 (Conn. D.P.U.C.).

87. *Id.* at *11.

88. *See id.* at *9.

states alone. Thus, states clearly are not preempted by field preemption. Also, there is no federal objective that is harmed by states ordering retail wheeling, precluding federal objective preemption. In fact, retail wheeling encourages electricity competition, an avowed purpose of the EPAct.

Thus, the only way a state may be preempted by federal law in the retail wheeling area is through conflict preemption. As long as a state is willing to cooperate with the FERC on such areas as transmission rates, terms, and conditions, then a state would not be preempted.⁸⁹ However, if the state and the FERC disagree on a transmission tariff, then it appears that the FERC would trump due to its jurisdiction over the interstate transmission of electricity. The best route is for states and the FERC to work together with states ordering retail wheeling and controlling the sale to the ultimate customer, and the FERC controlling the transmission rates.⁹⁰

III. DORMANT COMMERCE CLAUSE AND RETAIL WHEELING RECIPROCITY

Some states face an additional constitutional challenge to their electric retail competition plans. To date, four states (Illinois, Michigan, Montana, and Oklahoma) have retail open access plans that require reciprocal access to out-of-state electric utilities' service territories.⁹¹ The reciprocity requirements of each state are similar, so for brevity sake only the Illinois plan will be considered.

The Illinois Electric Service Customer Choice and Rate Relief Law of 1997 (the "Act")⁹² calls for a phase-in of retail competition until 2002 when most retail customers will have a choice of electric supplier. The Act provides for two forms of reciprocity—one for in-state municipal and rural cooperative electric suppliers and one for out-of-state alternative retail electric suppliers ("ARES"). Rural cooperatives and municipal utilities are not covered by the Act unless they elect to be.⁹³ If one so elects, then the utility must provide open access to its service territory if it desires to serve customers in another utility's territory.⁹⁴

ARES, on the other hand, are covered by the Act. If an ARES, its affiliate,

89. This, in fact, is the road states are taking. *See, e.g., In re Commission's Own Motion to Consider the Restructuring of the Electric Utility Industry*, 182 Pub. Util. Rep.4th (PUR4th) 416 (Mich. Pub. Serv. Comm'n 1998) (finding FERC's approved transmission tariff should be used in retail electricity direct access plan).

90. Perhaps the best way to describe the cooperation would be subsequent jurisdiction, as opposed to concurrent jurisdiction. First states order retail wheeling, and then the transmission rates, terms, and conditions are determined in cooperation with the FERC.

91. *See supra* notes 5-8. Even though the Michigan Supreme Court has found that the Michigan Public Service Commission does not have the statutory authority to order retail wheeling, Consumers Energy and Detroit Edison, which together control 90% of Michigan's electricity, have stated that they will voluntarily comply with the commission's plan. *See Michigan Utilities Volunteer to Deregulate*, THE ENERGY DAILY, July 6, 1999, at 3.

92. 220 ILL. COMP. STAT. 5/16-101 (West 1997).

93. *See* 220 ILL. COMP. STAT. 5/17-200, 5/17-300 (West 1997).

94. *See id.*

or its principal source of electricity owns or controls facilities for the distribution and transmission of electricity in its own defined service territory, then that ARES must provide reasonably comparable delivery service to the electric utility in whose service area the proposed service will be provided by the ARES.⁹⁵

This reciprocity provision may be seen as an impermissible burden on interstate commerce. While there is no express constitutional provision that prohibits states from burdening interstate commerce, courts have inferred this power from the Commerce Clause.⁹⁶ The Commerce Clause states Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States. . . ."⁹⁷ The dormant or negative Commerce Clause prevents states from erecting trade barriers or discriminating against out-of-staters even in the absence of federal regulation.⁹⁸

Dormant Commerce Clause challenges generally fall into two categories—laws that discriminate against out-of-staters and laws that treat out-of-staters and in-staters alike.⁹⁹ The former law is subject to a much stricter test, whereas the latter law is given more deference and will only be found unconstitutional if the burden on interstate commerce outweighs the law's benefits.¹⁰⁰

A. Reciprocity Laws Under the Strict Scrutiny Dormant Commerce Clause Test

If a state law is found to discriminate on its face or in its effect on out-of-staters, there is a presumption that the law violates the dormant Commerce Clause.¹⁰¹ However, such laws are not per se unconstitutional. If the state can prove that the law is necessary and is the least restrictive way to achieve an important governmental purpose, then the law may stand.¹⁰²

95. See *id.* 5/16-115. The Act provides:

[I]f the applicant, its corporate affiliates or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, the applicant, its corporate affiliates or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility. . . .

Id.

96. See CHEMERINSKY, *supra* note 12, at 307.

97. U.S. CONST. art. I, § 8, cl. 3.

98. See CHEMERINSKY, *supra* note 12, at 315.

99. See *id.*

100. See *id.*

101. See *id.*

102. See *id.* at 329.

When the Supreme Court has dealt with reciprocity laws, in all but one instance, it has found them unconstitutional.¹⁰³ Even though reciprocity laws do not completely ban out-of-staters from entry into the market, this fact does not save reciprocal laws that discriminate against out-of-staters.¹⁰⁴

In *Sporhase v. Nebraska*,¹⁰⁵ a Nebraska statute prohibited the removal of ground water for use in another state unless the other state granted reciprocal rights to withdraw and transport its ground water for use in Nebraska. Finding that the law discriminated against out-of-staters, the Court applied the strict scrutiny standard and found the law unconstitutional.¹⁰⁶ The Court emphasized that a legitimate local purpose would be conservation and preservation, a health and safety regulation at the core of a state's police power, but not economic protectionism.¹⁰⁷ While Nebraska did have a legitimate local interest in the conservation of water, the reciprocal law used was not closely tailored to that purpose; therefore, the Court held that law was an unconstitutional burden on interstate commerce.¹⁰⁸

Similarly, in *Great Atlantic & Pacific Tea Co. v. Cottrell*,¹⁰⁹ the Court found that a Mississippi regulation impermissibly burdened interstate commerce. The regulation stated that milk from another state could be sold in Mississippi if the other state's regulatory agency accepted Grade A milk produced in Mississippi on a reciprocal basis.¹¹⁰ The regulation required a signed reciprocity agreement with each state. The Court concluded that the means used to protect the health of its citizens was not rationally related to that purpose.¹¹¹ Furthermore, there were less restrictive means to achieve the state purpose, such as inspecting milk brought in from other states.¹¹²

Mississippi also argued that the provision was a free trade provision, encouraging rather than discouraging trade in milk products.¹¹³ The Court concluded that Mississippi cannot "use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement."¹¹⁴ Furthermore, Mississippi could sue Louisiana, or any other state, if it believed that Louisiana law limiting the importation of milk violated the

103. See *Northeast Bancorp, Inc. v. Board of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985) (finding state reciprocal banking privileges law not violative of the Commerce Clause because Congress authorized such laws).

104. See *New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988).

105. 458 U.S. 941 (1982).

106. See *id.* at 958.

107. See *id.* at 956.

108. See *id.* at 957-58.

109. 424 U.S. 366 (1976).

110. See *id.* at 367.

111. See *id.* at 375-76.

112. See *id.* at 377.

113. See *id.* at 378.

114. *Id.* at 379.

Commerce Clause.¹¹⁵

Thus, even if the avowed purpose of a reciprocity requirement is to encourage trade, the Court will invalidate it, unless there is an important governmental purpose that cannot be achieved through nondiscriminatory means.

In *New Energy Co. v. Limbach*,¹¹⁶ Ohio offered a tax credit for in-state producers of ethanol and for out-of-state producers only if that state provided for similar tax treatment of Ohio-produced ethanol. The Court found the tax credit violated the dormant Commerce Clause because the only true state purpose was merely economic protectionism for in-state ethanol producers.¹¹⁷ The reciprocity clause did not save the discriminatory provision. The substantial commercial disadvantage placed upon out-of-state ethanol producers was just as discriminatory as if Ohio had completely excluded the out-of-state goods.¹¹⁸ Even though the reciprocity clause may promote trade in ethanol by encouraging other states to give ethanol tax credits, the tax credit was still facially discriminatory and thus, unconstitutional.¹¹⁹ Furthermore, the means used were not the least restrictive to promote the ends of reducing harmful exhaust emissions or increasing trade in ethanol.¹²⁰

The Illinois retail electric reciprocity provision is not necessarily facially discriminatory against out-of-staters. All electric utilities in the state must also open their service territories to other electric utilities in-state and provide delivery service for such utilities.¹²¹ So too, ARES must provide reciprocal access to their territories in order to serve retail customers in Illinois.¹²² Yet, in-state municipal and rural cooperatives do not need to allow access to their territory, unless they elect to serve customers in another Illinois utility's territory.¹²³ Thus, out-of-state electric providers are treated the same as in-state electric cooperatives and municipal utilities if either wants to serve customers outside its territory, it must provide reciprocal access to its territory.

However, electric utilities in Illinois are treated somewhat differently. They are *required* to open their territory to other electric suppliers and are required to provide delivery service for the electricity supplied by those other suppliers. Thus, an Illinois electric utility is assured access to other Illinois territories, whereas an out-of-state utility must first provide access to its own territory.

Regardless of whether the Illinois Act discriminates against out-of-staters on its face, it almost certainly does discriminate in its effect. If the impact of a law is discriminatory, this is often enough to bring the case under the strict scrutiny

115. *See id.*

116. 486 U.S. 269 (1988).

117. *See id.* at 279.

118. *See id.* at 275.

119. *See id.* at 274.

120. *See id.* at 279.

121. *See* 220 ILL. COMP. STAT. 5/16-116 (West 1997).

122. *See id.* 5/16-115.

123. *See id.* 5/17-200, 5/17-300.

dormant Commerce Clause test.¹²⁴ In *C & A Carbone, Inc. v. Town of Clarkstown*,¹²⁵ a facially neutral law requiring all hazardous waste to be deposited at a transfer station was found to discriminate against out-of-staters in its impact. Under the strict scrutiny test, the Court found that even though the law applied to in-staters as well as out-of-staters, the effect on out-of-staters was enough to deem the law discriminatory.¹²⁶

However, in *Exxon Corp. v. Governor of Maryland*,¹²⁷ a state law was found not to be discriminatory even though it had a severely disproportionate effect on out-of-staters. A producer of petroleum was prohibited from operating a retail station in Maryland.¹²⁸ Because almost all petroleum products used in Maryland were produced out-of-state, local businesses were advantaged, while out-of-state companies were disadvantaged. Even though the burden of the statute fell solely on out-of-state companies, this did not lead to the conclusion that Maryland was discriminating against interstate commerce.¹²⁹ Because the statute did not impede the flow of petroleum in interstate commerce, did not place added costs upon interstate dealers, or distinguish between in-state and out-of-state companies, the majority found no discrimination.¹³⁰ While the majority did not rely on it in its holding, it is noteworthy that the purpose of the Maryland statute was to "correct the inequities in the distribution and pricing of gasoline" reflected by a survey the State had done.¹³¹ It is possible that the noble purpose of eliminating discrimination may have influenced the Court in its holding that discrimination in effect alone was not enough to bring the statute under the strict scrutiny test.

While the Illinois reciprocity provision affects utilities in-state as well as out-of-state, it clearly affects out-of-state utilities disproportionately. All in-state utilities are required or have a choice of free competition in the retail electric market. However, depending on the other state's laws, almost all out-of-state utilities do not have a choice. A utility simply is not free to open its territory to new electric suppliers, unless retail electric competition has begun. This, along with the arguably protectionist nature of the statute, would most likely make the Illinois reciprocity provision a discriminatory one, subject to the strict scrutiny test.

Therefore, only if the reciprocity requirement achieves an important state purpose that cannot be achieved with nondiscriminatory or less burdensome means will it be found constitutional. The purpose of the Illinois Act is to open up the retail electric market to competition. Surely, this is a legitimate and even

124. See CHEMERINSKY, *supra* note 12, at 319.

125. 511 U.S. 383 (1994).

126. See *id.*

127. 437 U.S. 117 (1978).

128. See *id.* at 137.

129. See *id.* at 125.

130. See *id.* at 126.

131. *Id.* at 121.

important state interest.¹³²

However, when the reciprocity requirement is considered separately, the state purpose needs more examination. There must be a state interest beyond simple economic protectionism that is important enough to justify the discrimination evident in the reciprocity clause. Reciprocity is designed to ensure fair play in the newly opened market. Its purpose is not entirely to protect local business interests. The health, welfare, and safety of the state's citizens could be adversely affected if retail competition were to occur without a reciprocity requirement.¹³³

Out-of-state utilities could come into Illinois markets and "cherry pick" all the incumbent utility's major commercial and industrial customers. Because that utility's state does not have an open market, this would leave the Illinois utility no way to recover this lost revenue. The reduction in revenue would increase rates for the essentially captive residential customers who may remain captive because it would not be economical for other utilities to come in and serve the residential loads. Even if the residential customers were picked up by another electric supplier, they would still be dependent on the incumbent utility for transmission and distribution service.¹³⁴ Conceivably, the local incumbent utility could be forced into bankruptcy or not have enough revenue to adequately maintain the transmission and distribution lines in its territory, potentially disrupting the flow of electricity to customers in the state.¹³⁵ Even after retail competition in electric supply arrives, the delivery function of electricity will remain a monopoly highly regulated by the state.¹³⁶ Therefore, the state will continue to have a strong interest in the provision of electricity to its citizens. Obviously, electricity is necessary for the health, safety, and welfare of the states' citizens.¹³⁷

Yet, even if a court found the above situation plausible and found an important state purpose in the reciprocity requirement, the purpose must not be achievable through an alternative nondiscriminatory or less restrictive way. The reciprocity provision may not withstand this strictest of scrutiny. Traditionally, the states are given great latitude in the manner of their regulation in the retail electric industry.¹³⁸ A state could regulate the industry during the transition from

132. This is evidenced by the fact that every state and the U.S. Congress has considered retail competition plans. *See State Profiles, supra* note 2.

133. *See infra* notes 197-217 and accompanying text for a more detailed explanation of the state interest in the reciprocity provision.

134. *See YAJIMA, supra* note 9, at 1.

135. *See Indianapolis Power & Light Co. v. Pennsylvania Pub. Util. Comm'n*, 711 A.2d 1071 (Pa. Commw. Ct. 1998) (recognizing the state's interest in maintaining the transmission and distribution networks located within the state).

136. *See YAJIMA, supra* note 9, at 1.

137. *See Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (noting that the regulation of electric utilities is one of the most important functions associated with the police powers of the states).

138. *See id.*

monopoly to competition in various, less restrictive, ways. A state could require licensing and other limitations on out-of-state utilities, just as it does for in-state utilities, without completely banning out-of state utilities which do not provide reciprocal access. Thus, even if there is a legitimate and important state interest in reciprocity, the Act's reciprocity requirement is not the least burdensome means of achieving the state's health, safety, and welfare goals.¹³⁹

B. Exceptions to the Dormant Commerce Clause: Market Participant

Even if a state law would violate the dormant Commerce Clause, the courts have fashioned two situations where the law may still be upheld—where the state is a market participant and where Congress has authorized the activity.¹⁴⁰ When the state is not acting as a regulator, but rather as a participant in an economic market, then the state may favor its own citizens.¹⁴¹

This doctrine was first recognized in *Hughes v. Alexandria Scrap Corp.*¹⁴² In this case, Maryland established a program to reduce the number of junked cars in the state, imposing more stringent standards on out-of-state scrap processors than on in-state processors. The Court finding no dormant Commerce Clause violation, stated “[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”¹⁴³

However, the state is only exempted from the dormant Commerce Clause strictures while acting as a participant in a particular market. In *South-Central Timber Development Inc. v. Wunnicke*,¹⁴⁴ the dormant Commerce Clause was violated when a state law required logs taken from state lands to be processed within the state. Although, the state could sell to whomever it desired as a market participant, it could not attach conditions to the sale that discriminated against out-of-staters.¹⁴⁵ The state could discriminate only in the market in which it participated. In *Wunnicke*, the state attempted to dictate what a purchaser did with the logs after the state sold the logs to the purchaser. Thus, the market participant exception did not save the law from unconstitutionality.¹⁴⁶

139. See also Jusitn M. Nesbit, Note, *Commerce Clause Implications of Massachusetts' Attempt to Limit Importation of "Dirty" Power in the Looming Competitive Retail Market for Electric Generation*, 38 B.C. L. REV. 811, 842-843 (1997) (finding that the State's attempted legislation limiting the importation of dirty power would violate the dormant Commerce Clause because less restrictive means existed to attain the State's environmental purposes).

140. See CHEMERINSKY, *supra* note 12, at 333.

141. See *id.*

142. 426 U.S. 794 (1976).

143. *Id.* at 810.

144. 467 U.S. 82 (1984).

145. See *id.* at 97.

146. See *id.* at 99.

In *Automated Salvage Transport v. Wheelabrator Environmental Systems*,¹⁴⁷ the state owned several trash-to-energy processing plants. The state allowed a private trash-to-energy plant to open pursuant to a settlement agreement that the private plant would turn away certain municipal waste that was already contracted to go to the state plants.¹⁴⁸ The state was found to be a market participant trying to enforce its contracts with the municipalities; therefore, the settlement did not violate the dormant Commerce Clause.¹⁴⁹

The states with electric retail reciprocity clauses likely would not be considered market participants. The doctrine is very specifically and sparsely applied.¹⁵⁰ It is true that electric utilities have been found to be state actors for antitrust purposes in some instances.¹⁵¹ However, even though electric utilities are highly regulated entities, they do not reach the point where the state is actually participating in the market. In *New England Power Co. v. New Hampshire*,¹⁵² the Court found that electricity was manufactured by private corporations using privately owned facilities. Thus, New Hampshire was not a market participant when it sought to restrict the sale of hydroelectric power out of the state.¹⁵³ The state is truly acting as a regulator, not a market participant, when it enacts and carries out laws aimed at the state's electric utility industry as a whole.

However, if a state did own an electric company, then it is conceivable that the state could prohibit out-of-state retail electric suppliers from selling electricity to end-users in its own service territory unless the utility allowed the state-owned electric company to sell retail electricity in its service territory. In that case, the state, as a seller of electricity, would truly be operating as a market participant and not merely as a regulator of the retail electric market.

Similarly, a municipal utility could claim market participant status. Municipal utilities (and sometimes rural cooperatively owned utilities) are normally exempted from pervasive state regulation because these utilities are, in essence, owned by the customers. It is possible that a municipal utility could impose a reciprocity requirement of its own and be exempt from a Commerce Clause attack as a market participant.

However, that is not the case here because the states are enacting legislation and regulations to regulate the retail electric market. The state is acting as regulator and not a market participant.

147. 155 F.3d 59 (2d Cir. 1998).

148. *See id.* at 62.

149. *See id.* at 79.

150. *See, e.g., South-Central Timber Dev., Inc.*, 467 U.S. at 93 (noting the market participant doctrine had only been applied in three cases to date.)

151. *See Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) (holding an electric utility to be state actor for antitrust purposes). *But see Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (finding electric utility was not state actor for antitrust purposes).

152. 455 U.S. 331 (1982).

153. *See id.*

*C. Exceptions to the Dormant Commerce Clause:
Congressional Authorization*

Another way a state law can be exempted from the dormant Commerce Clause is if Congress has authorized the state to act. This is a long accepted practice¹⁵⁴ and one of the few times when Congress has authority to overrule a Supreme Court decision.¹⁵⁵ If the Court finds that a certain state law violates the dormant Commerce Clause, then Congress can pass a law specifically authorizing the state law and Congress' decision will stand.¹⁵⁶

For instance, in *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System*,¹⁵⁷ the Court upheld Massachusetts and Connecticut laws that only allowed out-of-state holding companies to acquire in-state banks if the company's state provided for reciprocal and equivalent banking privileges for Massachusetts or Connecticut companies. The laws would have violated the dormant Commerce Clause except that Congress authorized them in the Bank Holding Company Act.¹⁵⁸

There have been claims that the Federal Power Act ("FPA") has given states certain immunity from dormant Commerce Clause attack. Recall that when the FPA gave the federal government power over energy regulation it reserved to the states certain powers.¹⁵⁹ In *New England Power Co. v. New Hampshire*,¹⁶⁰ a New Hampshire statute prohibited the exportation of hydroelectric energy when the New Hampshire Public Utilities Commission deemed the public interest would be served by using the power in-state. New Hampshire claimed that the statute was protected from the dormant Commerce Clause because Congress had authorized the statute in the FPA.¹⁶¹ Section 201(b) of the FPA provided that nothing in the Act should "deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."¹⁶² However, the Court found that this was not "an affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.'"¹⁶³ The saving clause merely saved the then existing state laws from federal preemption.¹⁶⁴ Neither the legislative history nor the language of the FPA indicated congressional intent to immunize states from Commerce Clause challenges.¹⁶⁵ In fact, the Court noted,

154. See, e.g., *In re Rahrer*, 140 U.S. 545 (1891).

155. See CHEMERINSKY, *supra* note 12, at 334.

156. See *id.*

157. 472 U.S. 159 (1985).

158. See *id.* at 174.

159. See 16 U.S.C. § 824 (1994).

160. 455 U.S. 331 (1982).

161. See *id.* at 339-40.

162. *Id.* at 341.

163. *Id.* (quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)).

164. See *id.*

165. See *id.*

that even if some legislative history indicated that Congress meant to protect states from Commerce Clause challenge, unless Congress has *expressly* stated that policy and intent, the Court cannot find congressional authorization.¹⁶⁶

In *Wyoming v. Oklahoma*,¹⁶⁷ Oklahoma claimed that the saving clause in the FPA gave congressional authorization to an Oklahoma state law that required electric utilities to use at least ten percent Oklahoma coal. Oklahoma believed that the saving clause that reserved to the states the regulation of retail electric rates permitted Oklahoma to discriminate in favor of its own citizens.¹⁶⁸ However, the Court found that even if the law was a legitimate part of the state's retail rate making authority, it was not exempt from dormant Commerce Clause scrutiny.¹⁶⁹ Relying on *New England Power Co. v. New Hampshire*, the Court noted that Congress must present an unambiguous intent to authorize states to burden interstate commerce and that intent was not found in the FPA.¹⁷⁰ Furthermore, the Court stated that its past decisions have uniformly subjected electric energy law cases to Commerce Clause scrutiny on the merits.¹⁷¹

Two more cases illuminate, or perhaps cloud, how explicit the congressional authorization must be in order to immunize states from Commerce Clause challenges. In *United Egg Producers v. Puerto Rico Department of Agriculture*,¹⁷² a federal egg labeling statute provided "no State or local jurisdiction other than those in noncontiguous areas of the United States may require labeling to show the State or other geographical area of production or origin."¹⁷³ Puerto Rico, being a noncontiguous area of the United States, passed a law requiring eggs imported into the Commonwealth to be stamped with the state of origin.¹⁷⁴

However, the court found that the alleged congressional authorization did not meet the high standard of explicitness necessary to exempt the law from the dormant Commerce Clause.¹⁷⁵ The court concluded that Congress could have, but did not, affirmatively give Puerto Rico authorization to require egg labeling.¹⁷⁶ So, if the language of the statute was read literally, it exempted Puerto Rico from this specific egg labeling prohibition.¹⁷⁷ However, it did not

166. See *id.* at 343.

167. 502 U.S. 437 (1992).

168. See *id.* at 457. Oklahoma argued that using in-state coal, which was higher in sulfur, combined with Wyoming coal would reduce local electric rates for consumers and conserve low-sulfur coal for future use. See *id.* at 457-58.

169. See *id.* at 458.

170. See *id.*

171. See *id.* (citing *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)).

172. 77 F.3d 567 (1st Cir. 1996).

173. *Id.* at 569.

174. See *id.*

175. See *id.* at 570.

176. See *id.*

177. See *id.*

mean that any regulation Puerto Rico required would be acceptable. Puerto Rico was still constrained by the strictures of the dormant Commerce Clause.¹⁷⁸

Yet, in *Shamrock Farms Co. v. Veneman*,¹⁷⁹ the court found congressional authorization for California milk standards. The federal Farm Bill stated that no provision of the Farm Bill or any other provision of law “shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding . . . milk products. . . .”¹⁸⁰ The court argued that the statement “any other provision of law” and “otherwise limit” indicated congressional intent to exclude California from the dormant Commerce Clause, not merely from federal laws or regulations.¹⁸¹

The state retail electric reciprocity laws could claim congressional authorization by the FPA and its EAct amendments. The case for FPA authorization is relatively weak as the two precedent cases prove.¹⁸² However, the EAct contains additional saving clauses that arguably could be congressional authorization for states in the areas of retail marketing¹⁸³ and the transmission of electric energy directly to an ultimate consumer.¹⁸⁴

First, the states would need to prove that the reciprocity clauses fall within the authority that Congress has reserved for the states in these two saving clauses. While the reciprocity clauses do involve the retail marketing areas and transmission of energy to an ultimate customer, the saving clauses certainly do not specifically mention state reciprocity clauses. Yet, even assuming reciprocity clauses are covered by these clauses, congressional authorization would not be found.

The saving clauses do not explicitly exempt states from the Commerce Clause in these two areas. The first clause states that “[n]o order may be issued *under this chapter* which is inconsistent with any State law which governs the retail marketing areas of electric utilities.”¹⁸⁵ Applying the above precedential decisions, the clause merely saves state laws from preemption or interference from the EAct, not from the strictures of the dormant Commerce Clause.

A second saving clause states that “[n]othing *in this subsection* shall affect any authority of any State or local government under State law concerning the

178. See *id.* While the egg labeling statute could be read as a congressional authorization for noncontiguous states to make any egg labeling regulations they so desired, the court found that this more extreme reading was not necessary because Congress’ intent was not unmistakably clear. See *id.* at 571.

179. 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 872 (1999).

180. *Id.* at 1180.

181. *Id.* at 1181.

182. See *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); see also *supra* notes 159-71 and accompanying text.

183. See 16 U.S.C. § 824k(g) (1994).

184. See *id.* § 824k(h).

185. *Id.* § 824k(g) (emphasis added).

transmission of electric energy directly to an ultimate consumer.”¹⁸⁶ Thus, the federal law is only saving the states’ authority from preemption under this subsection. It is not exempting all state action in the area from dormant Commerce Clause analysis. As *Shamrock Farms Co. v. Veneman*,¹⁸⁷ explained, Congress does not need to explicitly claim it is shielding the state from the dormant Commerce Clause; however, Congress must at least claim that the state law shall not be preempted by the current law or “*any other provisions of law*.”¹⁸⁸ Nothing in the EPA Act provisions or the legislative history shows unmistakably clear congressional intent to exempt states from dormant Commerce Clause analysis.

D. Reciprocity Laws Under the Balancing Commerce Clause Test

As explained above, the four states reciprocity laws, as currently written, would most likely fall under the strict scrutiny Commerce Clause test that is reserved for discriminatory state laws.¹⁸⁹ However, it may be possible to write a state retail electric restructuring law that does not discriminate and instead would be subject to the less strict balancing test. If the state restructuring law treated all electric utilities in the state and outside of the state the same, the law would not discriminate on its face. Such a law could make all opening up of defined service territories optional on the part of the electric utility. However, if a utility choose to serve customers in an area that was not its own, then that utility would be required to allow the other electric utility to serve customers within its own service territory. In other words, all in-state electric utilities would be subject to a reciprocity requirement; the same requirement that all out-of-state and municipal and rural cooperatives are subject to under the Illinois Act. Thus, all electric utilities would be treated alike; Illinois electric utilities would no longer have the automatic advantage of knowing they could serve in any other Illinois electric utility’s area.

However, such a law may be subject to claims of discriminatory impact. Case law seems inconsistent about when a discriminatory impact or purpose reaches a level that brings a state law under the strict scrutiny Commerce Clause test.¹⁹⁰ Some state laws that had a discriminatory purpose and effect were not considered discriminatory.¹⁹¹ The proposed reciprocity law does not have a discriminatory intent or purpose. Its purpose is to allow electric utilities the

186. *Id.* § 824k(h) (emphasis added).

187. 146 F.3d 1177 (9th Cir. 1998).

188. *Id.* at 1181 (emphasis added).

189. *See supra* text accompanying notes 124-39.

190. *See* CHEMERINSKY, *supra* note 12, at 319.

191. *See* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (holding that a law prohibiting milk sold in plastic containers that disproportionately benefitted in-state paper producers was not discriminatory); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (finding state law not to be discriminatory even though the law had a severely disproportionate effect on out-of-staters).

freedom to be competitive, while ensuring fair play. Yet, the impact of the law may fall disproportionately on out-of-state utilities.¹⁹² However, that may not be enough to make the law discriminatory. Like *Exxon Corp.*,¹⁹³ the purpose of the electric restructuring laws is to eliminate the discrimination that already exists in the electric industry by opening up service territories to competition.¹⁹⁴ Thus, consistent with *Exxon Corp.*, a court could find that the discriminatory impact of the reciprocity laws is not enough to bring the law under the strict scrutiny test. Therefore, the traditional balancing test would apply.

The balancing test for dormant Commerce Clause analysis was described in *Pike v. Bruce Church, Inc.*:¹⁹⁵ "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹⁹⁶ Thus, the reciprocity clause only needs to have a legitimate state purpose, not an important one. And, the burden on interstate commerce does not need to be the least restrictive burden possible, but only needs to be less than the local benefits of the law.

Proof of a legitimate state interest in the provision of electric service is not hard to find. It is accepted that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."¹⁹⁷ When determining whether a state electric utility law violates the Commerce Clause, the courts had traditionally relied on a bright line distinction—wholesale sales and transmission in interstate commerce were for the federal government and retail sales, intrastate transmission, and distribution of electricity were subjects of state authority.¹⁹⁸ However, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, the Court determined that the modern Commerce Clause test was a better method.¹⁹⁹ Thus, electric utilities are subject to the *Pike v. Bruce Church* test, just as all other industries are. Furthermore, the Court noted that the balancing test usually gives *more latitude* to the state regulation.²⁰⁰

Thus, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, the Court allowed Arkansas to regulate a wholesale electric

192. The surrounding states may not have open retail electricity markets. Thus, out-of-state utilities may not have a true choice to join the open state's retail market, because they could not provide reciprocal access.

193. 511 U.S. 383.

194. See text accompanying *supra* notes 127-31 for a more detailed examination of *Exxon Corp.*, 437 U.S. at 121.

195. 397 U.S. 137 (1970).

196. *Id.* at 142 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

197. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

198. See *id.* at 379.

199. See *id.* at 390.

200. See *id.*

transaction that was traditionally the FERC's role. However, because the wholesale transaction concerned a rural cooperative funded by the Rural Electrification Administration ("REA"), the FERC had disclaimed jurisdiction.²⁰¹ The state was found to have a legitimate state interest in the wholesale rates charged by the rural cooperative because its operation occurred within the state and the wholesale rates affected the retail rates of consumers.²⁰² Furthermore, the effect on interstate commerce was found to be incidental. The Court concluded that even though some of the electricity came from out-of-state, that was true for most retail utilities and the states have always regulated retail utilities.²⁰³

In *General Motors Corp. v. Tracy*,²⁰⁴ the Court concluded a state's legitimate interest in utility regulation outweighed the incidental burden on interstate commerce of a tax law.²⁰⁵ A natural gas marketer challenged the law which gave sales and use tax exemptions to Local Distribution Companies ("LDCs") and not to natural gas marketers.²⁰⁶ Because all LDCs were located in Ohio, General Motors claimed the statute was discriminatory. The Court held it was not because the LDCs and gas marketers served different markets.²⁰⁷ The health and safety interests of the state in delivery to natural gas customers was an obviously legitimate state concern.²⁰⁸ The Court, relying on *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*,²⁰⁹ noted:

In view of the economic threat that competition for large industrial consumers posed to gas service to small captive users, the Court again reaffirmed its longstanding doctrine upholding the States' power to regulate all direct in-state sales to consumers, even if such regulation resulted in an outright prohibition of competition for even the largest end users.²¹⁰

Thus, the Court concluded that there was no discrimination or burden on interstate commerce imposed by the preferential tax law.²¹¹

The electric retail reciprocity laws can claim a legitimate state interest in the health, safety, and welfare of its citizens. Even after retail competition begins,

201. See *id.* at 381-82; *supra* text accompanying notes 45-50 for a discussion of the federal preemption issue in *Arkansas Electric Cooperative Corp.*

202. See *Arkansas Elec. Coop. Corp.*, 461 U.S. at 394.

203. See *id.* at 395.

204. 519 U.S. 278 (1997).

205. While *General Motors Corp. v. Tracy* is a natural gas case, the similarities in the Natural Gas Act and Federal Power Act are sufficient to assert its relevance. See, e.g., *Arkansas Elec. Coop. Corp.*, 461 U.S. at 378-79 (noting that Congress created the FERC to oversee the wholesale transaction of both the electric and the natural gas industries).

206. See *General Motors Corp.*, 519 U.S. at 286-89.

207. See *id.* at 303-04.

208. See *id.* at 304-06.

209. 341 U.S. 329 (1951).

210. *General Motors Corp.*, 519 U.S. at 305-06.

211. See *id.* at 303-04.

in-state utilities will be responsible for the delivery of electricity to in-state consumers. Thus, the state will continue to have a legitimate interest in the viability and profitability of in-state electric utility distributors. As the Court noted in *General Motors Corp. v. Tracy*, the economic threat that competition for large industrial customers poses to retail customers justifies a state's regulation of retail electric sales to ultimate customers, even to the extent of prohibiting competition.²¹² The reciprocity requirements do not go that far; they simply require reciprocal access as a condition of competition. The reciprocity requirement ensures that in-state utilities will remain viable and the health, safety, and welfare of the state's citizens are protected by consistent and affordable electric service.

The state retail electric competition plans and their reciprocity requirements are legitimate areas of state regulation because the retail electric industry is a highly regulated field, imbued with the public interest.²¹³

The FERC has not taken on retail competition and, in fact, is prohibited by the EPAct from ordering retail wheeling, a necessary aspect of retail competition. Just as the FERC disclaimed jurisdiction over the rural cooperatives funded by the REA, the FERC has disclaimed or been prohibited from exercising jurisdiction over retail competition. There is nothing in the FPA that shows a federal intent to leave the area of retail electric energy unregulated because the FPA was created to fill a regulatory gap and not to create one.²¹⁴ Thus, the states should be able to make laws affecting retail electric competition.

If, in making those laws, the state incidentally affects interstate commerce through a reciprocity requirement, the law should not be found to violate the dormant Commerce Clause. The putative local benefits of retail competition, and reciprocity in particular, outweigh any incidental affect on interstate commerce. In fact, the burden on interstate commerce is actually less under the Illinois electric restructuring Act than it was under traditional retail electric regulation. In a closed, monopolistic retail electric market, out-of-state utilities are completely banned from supplying electricity to in-state customers.²¹⁵ Yet, the states are authorized by the FPA, as amended, to keep the market closed and prohibit out-of-state suppliers of electricity.²¹⁶

212. See *id.* at 304-06.

213. Cf. *Bennett Elec. Co. v. Village of Miami Shores*, 11 F. Supp. 2d 1348 (S.D. Fla. 1998) (noting that because garbage collection was traditionally a governmental or highly regulated function, a city law controlling garbage collection was not discriminatory and passed the balancing test).

214. See *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983).

215. See George Sawyer Springsteen, *Government Regulation and Monopoly Power in the Electric Utility Industry*, 33 CASE W. RES. L. REV. 240, 251-52 (1983) (explaining that territorial restrictions imposed by state electric utility regulators have the effect of excluding all but a single electric supplier from a specific territory).

216. See 16 U.S.C. § 824(a) (1994) (leaving the regulation of retail electric matters to the states' sole authority); *id.* § 824k(g) (leaving the regulation of retail marketing areas (or service

It is possible that once the retail market is opened-up to out-of-state electricity, the market becomes an interstate one and thus, any trade barriers are prohibited by the Commerce Clause. However, even in a closed electric market, almost all electricity that is supplied to customers has some out-of-state power intermingled.²¹⁷ Thus, strictly speaking, even a closed retail market is an interstate market, yet absolute prohibition of out-of-state electric suppliers is still permitted.

Thus, the burden on interstate commerce the reciprocity requirement promotes is minimal in relation to the local benefits the reciprocity requirement creates. As such, the reciprocity laws would pass the less strict dormant Commerce Clause balancing test.

E. The Unique Nature of Electric Utilities

While the current construction of the reciprocity requirement may not pass the traditional dormant Commerce Clause challenge, there is strong reason for a court to consider the unique nature of the electric utilities when examining retail electric restructuring laws. Arguably, traditional Commerce Clause analysis simply does not apply to this industry. There are three justifications for the dormant Commerce Clause—historical, economic, and political.²¹⁸ Historically, the Commerce Clause was intended to prevent a state from erecting trade barriers that interfered with interstate commerce.²¹⁹ Economically, the country is better off if there are no laws that impede the free flow of goods in interstate commerce.²²⁰ The political justification is that citizens in one state should not be harmed by laws of another state where they lacked political representation.²²¹

Retail electric restructuring laws, particularly the reciprocity requirement, do not violate these justifications. The retail electric industry is controlled by state law. Traditionally, electric service has been a monopoly service with the state assigning specific service territories for electric utilities in exchange for the electric utility's duty to serve the public.²²² The ability of states to restrict competition in the area is not challenged, as confirmed by the FPA and police powers of the states.²²³

territories) to the states' exclusive authority).

217. See *Arkansas Elec. Coop. Corp.*, 461 U.S. at 395.

218. See CHEMERINSKY, *supra* note 12, at 309.

219. See *id.*

220. See *id.*

221. See *id.*

222. See, e.g., 220 ILL. COMP. STAT. 30/2 (West 1998) (declaring exclusive service territories as in the public interest to avoid duplication of facilities and increase efficiency of the State's retail electric system).

223. See *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (noting that the regulation of electric utilities is one of the most important functions associated with the police powers of the states); Springsteen, *supra* note 215.

Even though the electricity that comes into most homes and businesses is commingled with out-of-state electricity, thus affecting interstate commerce, currently, the states still retain the power to limit competition in the industry—erecting trade barriers.²²⁴

The purpose of state retail electric restructuring laws is to encourage competition in an industry that has always been a monopoly. These laws should be encouraged because they are eliminating trade barriers and not establishing them. The historical justification and the economic justification for the dormant Commerce Clause—to prohibit trade barriers and encourage the free flow of goods in interstate commerce—are actually promoted by retail electric open access laws. Also, the political justification for the dormant Commerce Clause—that citizens of one state should not be harmed by laws of another state where they lacked political representation—is not found in these reciprocity laws. The laws do not harm out-of-state citizens any more than the current anti-competitive laws that are within a state's authority to enact. States should be able to add a reciprocity requirement so that the transition from monopoly to competition can occur safely and with minimal risk to the electric infrastructure and the safety and welfare of the state's citizens.

The other reciprocity cases that were found to violate the dormant Commerce Clause were trying to prohibit the introduction or exportation of products from their states or were attempting to give local business a benefit.²²⁵ The reciprocity laws are doing neither. They are an attempt to encourage other states to open their retail electric markets, so that an otherwise closed market can be competitive. The only recourse a state has to safely open its retail electric market is to require reciprocal access to other markets. The in-state electric utilities are not being specifically benefitted by the reciprocity laws; they are only prevented from harm by unfair competition.

A court made this argument when the Pennsylvania retail electric restructuring plan was challenged as violating the dormant Commerce Clause.²²⁶ In *Indianapolis Power & Light Co. v. Pennsylvania Public Utility Commission*, IP&L challenged the plan's stranded cost²²⁷ provision as a violation of the Commerce Clause. IP&L claimed that allowing the recovery of stranded costs gave in-state electric utilities an advantage over out-of-state electric utilities.²²⁸ The court found that the law did not violate the Commerce Clause because it did not discriminate against interstate commerce and was strikingly unlike the laws invalidated by previous Supreme Court Commerce Clause decisions.²²⁹ The

224. See Springsteen, *supra* note 215, at 251-52.

225. See *supra* text accompanying notes 103-20.

226. See *Indianapolis Power & Light Co. v. Pennsylvania Pub. Util. Comm'n*, 711 A.2d 1071, 1079 (Pa. Commw. Ct. 1998).

227. Stranded costs are the costs electric utilities put into new generation and power supply contracts in reliance on a monopoly market. When the monopoly status is taken away, most retail electric restructuring plans allow utilities to recover at least some of these costs from ratepayers.

228. See *Indianapolis Power & Light Co.*, 711 A.2d at 1075.

229. See *id.* at 1077.

court noted:

[T]he statutes that were struck down by the Supreme Court involved the stifling of interstate commerce through local favoritism in then currently competitive markets. The Competition Act, read in whole, invites competition into an industry that has been historically limited to state-regulated monopolies, and as such, it is so distinct from Commerce Clause precedent that we must find that it does not involve the Commerce Clause. To hold otherwise would expand Supreme Court precedent²³⁰

The court claimed that the stranded cost provision was merely one element of a planned move toward competition in an Act that is the antithesis of a statute that discriminates against interstate commerce.²³¹ Finally, the court argued that the Commerce Clause should not be used to hinder states in their attempt to bring competition into the electric industry, noting that the move to competition is a national trend and states should be encouraged to experiment.²³²

These arguments easily apply to retail electric reciprocity clauses. While the courts have addressed the issue of state's attempting to encourage other states to enact certain laws or policies and found those arguments unpersuasive,²³³ the courts have never dealt with a situation where a complete trade barrier existed and a single state was attempting to withdraw that barrier.

For example, in *Great Atlantic & Pacific Tea Co. v. Cottrell*, the Court argued that the Commerce Clause itself provided the necessary reciprocity and that if Mississippi thought Louisiana's laws discriminated against interstate commerce, Mississippi could sue.²³⁴ However, that option is not available to a state with a retail electric reciprocity law. Other states may completely bar out-of-state utilities from supplying retail electric service and because of the FPA as amended, the other states are not violating the Commerce Clause.²³⁵

So, the Commerce Clause itself does not provide reciprocity in this situation. Furthermore, reciprocity is abundant in the electric and natural gas industries. Transmission reciprocity is required by the FERC for electric sales at wholesale.²³⁶ True and fair competition cannot occur in the electric generation industry without it. Eventually, the retail electric market in every state will be open and reciprocity requirements will not be necessary. However, in the transition, reciprocal access is necessary and fair.

230. *Id.* at 1076 n.7.

231. *See id.* at 1077.

232. *See id.* at 1082.

233. *See New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *see also supra* notes 109-20 and accompanying text.

234. *See Great Atlantic & Pacific Tea Co.*, 424 U.S. at 379.

235. *See supra* notes 215-16, 223.

236. *See Order 888, supra* note 56, at 31,635.

IV. POSSIBLE FEDERAL SOLUTIONS, OTHER OPTIONS

Clearly there are many hurdles facing the states as they attempt to open their retail electric markets to competition. An obvious solution to the constitutional challenges states may face is some form of federal action. The federal government could enact legislation that makes it clear who has jurisdiction to order retail wheeling and whether states have the power to require reciprocity. While the 105th Congress introduced fourteen electric restructuring bills, none of them were considered.²³⁷ Yet, many in the industry are hopeful that the 106th Congress will finish the job.²³⁸ Following are several options awaiting congressional action.

A. Date-Certain Retail Open Access and Distribution Reciprocity

Federal legislation could mandate states to open their retail electric markets to competition by a certain date.²³⁹ Congress would need to clarify the FERC's role, perhaps by allowing it to order retail wheeling. Reciprocity could be allowed in the transition period, but would not be necessary once the date arrives when all states have open access.

Another Senate bill would write legislation that used the Commerce Clause to keep states from discriminating against consumers who purchase electricity in interstate commerce.²⁴⁰ Senator Nickles' bill does not impose a federal mandate on the states, but the legislation has the same effect; all states must allow for open access to retail customers or be faced with a Commerce Clause challenge.²⁴¹ The bill takes away the state's authority under the FPA to create and maintain utility monopoly franchises. However, the bill still allows states to require reciprocity.²⁴²

While such legislation could answer the constitutional questions raised by this Note, there are political problems with mandating competition. Consumer groups complain a mandated deadline for states to open up retail markets could harm consumers.²⁴³ States need flexibility so that consumers do not get stuck

237. See Victoria K. Green, *Congress Looks to Next Session to Work on Plugging in Electricity Restructuring*, THE OIL DAILY, Nov. 4, 1998, available in 1998 WL 9212080, at *1.

238. See *id.*; see also *Richardson Predicts Mandate Bill in '99*, RESTRUCTURING TODAY, Oct. 29, 1998, at 3 (Energy Secretary confident that electric restructuring bill will pass in 1999).

239. U.S. Representatives Largent and Paxon proposed a draft bill similar to this approach in 1998 and are expected to renew the bill in the 106th Congress. See *Recent Legislative Activity Indicates Push Is Still On to Restructure Electric Utility Industry During This Congress*, FOSTER ELECTRIC REPORT, July 1, 1998, Report No. 142, at 1, available in 1998 WL 7902285 [hereinafter *Push Is Still On*].

240. See Electric Consumer Choice Act, S. 2187, 105th Cong. (1998).

241. See *Nickles Introduces Restructuring Bill That Relies on Commerce Clause*, ELECTRIC UTILITY WEEK, June 22, 1998, at 6, available in 1998 WL 10046671.

242. See *Push Is Still On*, *supra* note 239, at 2.

243. See *Federal Mandates on Retail Access Would Harm Consumers, Report Says*, INSIDE F.E.R.C., Apr. 14, 1997, at 4, available in 1997 WL 9127275.

with paying for unreasonable stranded costs. If the open access date bargaining chip is taken away from states, utilities will be in a better bargaining position and retail customers could get stuck with an unfavorable plan.²⁴⁴

Another political consideration that Congress will need to recognize is that retail electric service is the state utility commissions' historical turf.²⁴⁵ Federal mandates may not be politically popular in all states, particularly cheap electricity states.²⁴⁶ In fact, regulators from twenty-three low cost electricity states have asked Congress not to mandate restructuring for the electric industry.²⁴⁷ The states claim that they are in the best position to decide when and how the retail electric market should be opened.²⁴⁸ The National Association of Regulatory Utility Commissioners ("NARUC") agrees, claiming that states should have exclusive jurisdiction over retail electric competition.²⁴⁹

B. Clarifying States' Authority While Not Requiring Open Retail Electric Markets

A better option for Congress seems to be legislation that clarifies what states can and cannot do to open their electric retail markets, while not requiring states to open their electric markets. Several bills were introduced in the 105th Congress and are expected to be reintroduced in 1999 that take this approach.²⁵⁰ The Clinton administration bill is an apt example.²⁵¹ The bill would allow electric consumers to choose their electric supplier by 2003. However, the bill would allow states to opt-out and keep the status quo or an alternative state-crafted plan.²⁵² The bill, along with many others, would also allow states to require reciprocity.²⁵³

Many in the industry see this as an important function of federal legislation—ensuring that states can constitutionally require reciprocity.²⁵⁴ Elizabeth Moler, Department of Energy Deputy Secretary, noted that "[t]he best

244. *See id.*

245. *See Jost, supra* note 67, at 58.

246. *See Low-Cost States Say Feds Should Not Order Dereg*, MEGAWATT DAILY, Dec. 14, 1998, at 1.

247. The low-cost states include: Alabama, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. *See id.* at 2.

248. *See id.* at 1.

249. *See id.* at 2.

250. *See Green, supra* note 237, at *1-2.

251. *See Comprehensive Electricity Competition Act*, S. 2287, 105th Cong. (1998).

252. *See Push Is Still On, supra* note 239, at 1.

253. *See, e.g.*, S. 2187, 105th Cong. (1998); S. 722, 105th Cong. (1997); S. 1276, 105th Cong. (1997); S. 1401, 105th Cong. (1997); H.R. 4715, 105th Cong. (1998).

254. *See Restructuring Bill or Statement of Principles? White House Is Unsure*, INSIDE ENERGY/ WITH FEDERAL LANDS, Dec. 15, 1997, at 5, available in 1997 WL 9131516.

we can do may be to recognize the authority of the state to decide . . . whether they want to limit the participation of utilities from outside their borders in their state programs if those utilities are not open.”²⁵⁵

Another practical solution Congress could pursue to ensure that states have the authority to require reciprocity, if they so desire, is a reciprocity provision that contains a federal certification system.²⁵⁶ Utilities could be certified by their home states as a utility that allows alternative electric suppliers into its territory. Then, that certification would serve as a ticket for that utility to serve in other states who have open access.²⁵⁷ This approach allows states flexibility and can be done without drastically changing the federal/state jurisdictional roles, thereby making it politically appealing.²⁵⁸ Any of the above federal alternatives that allow states flexibility is more politically likely to win congressional approval.

C. *An Expanded Role for the FERC*

Another possible solution to the jurisdictional and constitutional problems facing retail competition is for the FERC to expand its role now and have Congress follow with appropriate legislation. Of course, the FERC as an administrative agency is limited by the federal energy statutes.²⁵⁹ However, there may be ways for the FERC to increase its involvement in retail competition while, technically, staying within those limits. The FERC’s Commissioner Massey claimed that the FERC should consider extending Order 888 to cover retail service.²⁶⁰ Cooperation between the FERC and the states could lead to grid regionalization through Independent System Operators or Regional Transmission Companies.²⁶¹ Dialogue with the states is needed in the transition to competition, but Massey believes that “[i]f FERC does not lead . . . the transition could spur inefficiency.”²⁶² With fifty states enacting various retail restructuring programs, the FERC argues that gaps will occur. The FERC’s Chairperson Hoecker suggested that perhaps the FERC is in the best position “to address these gaps and to harmonize the power marketplace both vertically (state/federal) and horizontally (state-to-state).”²⁶³

255. *Id.*

256. See M. Bryan Little, *Wheeling Reciprocity: By Checklist or Certification?*, PUBLIC UTILITIES FORTNIGHTLY, June 15, 1998, at 46.

257. See *id.*

258. See *id.*

259. See PETER L. STRAUSS, ADMINISTRATIVE LAW; CASES AND COMMENTS 10 (9th ed.) (1995).

260. See Massey: *FERC Should Consider Extending 888 to Retail*, MEGAWATT DAILY, Nov. 10, 1998, at 3.

261. See *id.*

262. *Id.*

263. See Hoecker *Creates Ombudsman Position to Coordinate State/Federal Policies*, FOSTER ELECTRIC REPORT, Dec. 17, 1997, Report No. 128, at 2, available in 1997 WL 10339976, at *6.

However, any action by the FERC, absent congressional approval, may be seen by the states as a co-opting of state authority. The same political problems that exist with a congressional mandate, exist with the FERC taking over.

D. Interstate Compacts as a Solution

Another option for Congress is to authorize the states to create interstate compacts in the retail electric area. This option has the advantage of leaving the tough policy decisions of when and whether to open up retail markets to the states. Several states in one region could consent to retail electric reciprocity through a compact. In fact, states may not even need congressional approval to create interstate compacts. In *United States Steel Corp. v. Multistate Tax Commission*,²⁶⁴ a multistate compact did not violate the Constitution's Compact Clause²⁶⁵ even though it was not expressly authorized by Congress. The Court concluded that if an agreement did not diminish federal power or enhance state power at the expense of federal power, then congressional approval was not necessary.²⁶⁶

Thus, an examination of the particular interstate compact would be necessary to determine if federal power was being diminished. This would lead right back to the jurisdictional questions this Note examines. Another difficulty with such an option would be gaining cooperation with states within a region. It makes sense for states in close proximity to create an interstate reciprocity agreement, but these are the same states that are competing with each other for industrial loads, making common ground hard to find.

E. The Hold-Out Approach

A final option for states as they consider drafting retail electric restructuring legislation is simply to install a long transition period. That way states can act now to restructure the retail electric industry, but the constitutional issues involved will not be immediately ripe for judicial review.²⁶⁷ By the time true retail electric choice occurs within the state, Congress will have acted, either to give the state the authority needed to proceed, or to mandate open access.

F. Should Retail Electric Reciprocity Be Required?

Now that the question of "can states do it?" has been considered, it is worth examining the question of "should states do it?" A National Association of Regulatory Utility Commissioners ("NARUC") resolution states that Congress

264. 434 U.S. 452 (1978).

265. U.S. CONST. art. I, § 10, cl. 3.

266. See *United States Steel Corp.*, 434 U.S. at 471.

267. See, e.g., *American Energy Solutions v. Alabama Power Co.*, 16 F. Supp. 2d 1346 (M.D.Ala. 1998) (challenge of stranded cost surcharge provision in electric restructuring law not ripe for review until someone is charged the surcharge).

should *not* require or even allow states to voluntarily require reciprocity.²⁶⁸ The resolution claims that retail electric reciprocity may reduce the choice of electric suppliers. Thus, consumers will be harmed by the unavailability of the cheapest source of electricity.²⁶⁹ Furthermore, with a reciprocity requirement states may have to become reciprocity police, presenting enforcement problems.²⁷⁰

However, states will require certification of electric suppliers regardless, and the process of deciding if a certain supplier meets the reciprocity provision could be streamlined with the certification process.²⁷¹ Also, reciprocity has an air of fairness to it. It provides a safe means for states to open their markets with the assurance that in-state utilities will remain viable. That closed state utilities could increase revenues by supplying electricity in open states, while maintaining their monopoly status in their home state, just does not seem fair.

CONCLUSION

States should have the power to order retail wheeling under the current federal energy laws. The federal government has not preempted such authority, although as a practical matter, federal/state cooperation may be needed to make retail wheeling a reality. However, the four states' retail electric reciprocity clauses probably do violate the dormant Commerce Clause using traditional strict scrutiny Commerce Clause analysis. Yet, if a reciprocity clause was drawn so as not to facially or effectually discriminate against interstate commerce, then such a clause would pass the traditional Commerce Clause balancing test.

Furthermore, there are real reasons that a unique form of analysis should be used for examining the electric industry. Retail electric open access laws promote rather than impede interstate commerce in electric energy. As such, courts need to take the unique characteristics of the industry into account when examining retail electric restructuring laws. Perhaps, traditional Commerce Clause analysis just doesn't make sense in this newly competitive industry.

Finally, while there are many possible federal solutions to the issues this Note raises, the best course is for the federal government to allow the states to perform their novel experiments in the retail electric industry. When necessary, the federal government should step in only to give states the authority needed to ensure a fair transition to retail electric competition.

268. See *State Utility Regulators Do Not Believe Electricity Legislation*, INSIDE ENERGY/WITH FEDERAL LANDS, Aug. 18, 1997, at 5, available in 1997 WL 9131107.

269. See *id.*

270. See Craig S. Cano, *Stranded-Costs Securitization, Reciprocity Draw State Regulators' Eye*, INSIDE F.E.R.C., July 28, 1997, at 9.

271. See *In re the Restructuring of the Electric Utility Industry*, 177 Pub. Util. Rep. 4th 201, at 220 (Mich. Pub. Serv. Comm'n June 5, 1997).

HOMEOWNERS INSURANCE: A WAY TO PAY FOR CHILDREN'S INTENTIONAL—AND OFTEN VIOLENT—ACTS?

CYNTHIA A. MUSE*

INTRODUCTION

It almost seems to be an everyday occurrence. A child, often a young child, shoots another child or sets fire to a home or store. The stories from 1998 alone stun and horrify most Americans. In Jonesboro, Arkansas, boys, ages eleven and thirteen, fired shots in a schoolyard killing and injuring classmates and a teacher.¹ In Dallas, three boys, ages seven, eight, and eleven, were arrested and charged with sexual assault of a three-year-old girl.² In Chicago, a five-year-old boy was beaten by two children, one of whom was only nine years old.³ The list goes on and on.

These tragic stories are a reflection of reality. Statistics show that crimes committed by minors are steadily increasing. Researchers at the U.S. Department of Justice estimate that the number of juvenile crime arrests will double by the year 2010 if population and arrest-rate-increases continue at their current pace.⁴ Population growth is expected to continue, with the number of teenagers between fifteen and nineteen years old growing an additional 23% by the year 2005.⁵ Just as disturbing as the projected increase in the number of crimes committed by minors is that the minors committing crimes are increasingly younger. Between 1985 and 1993 the number of homicides committed by fourteen- to seventeen-year-old boys increased 165%.⁶ The number of homicide arrests for boys twelve years and younger doubled during approximately the same time period.⁷ Also,

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1. See Peter Annin & Jerry Adler, *Murder at an Early Age*, NEWSWEEK, Aug. 24, 1998, at 28, 28; John Cloud, *For They Know Not What They Do? When and How Do Children Know Right from Wrong? And How Can We Devise a Punishment to Fit Their Crimes?*, TIME, Aug. 24, 1998, at 64, 64.

2. See Annin & Adler, *supra* note 1, at 28.

3. See Cloud, *supra* note 1, at 64.

4. See Julie Good, *Preventing Violence: From Tragedy to Solutions*, U.S.A. TODAY, May 1, 1998, at 46, 47; see also Robert L. Jackson, *Juvenile Arrest Rate for Violent Crimes Declines 9.2%*, L.A. TIMES, Oct. 3, 1997, at A25 (reporting that in 1996, there were 464.7 violent crime arrests for every 100,000 youths between 10 and 17 years old).

5. See James Alan Fox & Glenn Pierce, *American Killers Are Getting Younger*, U.S.A. TODAY, Jan. 1, 1994, at 24, 25.

6. See Good, *supra* note 4, at 47. But see Jackson, *supra* note 4, at A25 (noting that arrests of youths, between ages 10 and 17, declined 10.7% for murder in 1996).

7. See Good, *supra* note 4, at 47 (stating that homicide arrests doubled for boys 12 years old and younger between 1985 and 1992). But see Annin & Adler, *supra* note 1, at 28 (stating that the number of children younger than 10 years old charged with murder is small and not increasing).

rape arrests for children under twelve years of age have more than doubled.⁸ While juvenile crime has decreased in recent years, experts warn that as the youth population increases over the next few years, youth crime could reach "record proportions."⁹

The criminal justice and juvenile court systems work to punish the minor attacker, thereby addressing the public policy goal of deterrence. However, these systems do not adequately address another significant public policy goal: compensation to the victim(s) of the attack. One way to achieve victim compensation is for the victim, or his parents, to bring a civil suit against the attacker for his intentional act. The minor attacker, who is often an insured under his parents' homeowners insurance policy, then claims protection from financial responsibility because insurance coverage is in place. In many cases, the primary, or only, compensation for a victim's injury is from a liability insurance policy.¹⁰ However, case law is inconsistent with regard to whether homeowners insurance policies cover intentional acts committed by minor insureds.¹¹ Varying factual situations and ambiguity in policy language have led to inconsistent and evolving law.¹²

Part I of this Note reviews the homeowners insurance policy: its purpose, policy language, and applicable exclusions. Part II describes the tests used to determine if an intentional act is covered by homeowners liability insurance. Part III outlines recent applications of the tests to four major types of acts committed by minors: shootings with BB guns, shootings with firearms, physical assaults, and arson and the impact of a minor's age on decisions of coverage. Sexual molestation of children by other minors is not covered in this Note because it is discussed extensively in several recent law review articles and case decisions.¹³ This Note concludes by discussing whether coverage for intentional

significantly; only 17 were charged in 1996 compared to an average of 13 charged each year in the 1980s).

8. See Annin & Adler, *supra* note 1, at 28 (stating that between 1980-1996, the number of rape arrests for children under 12 increased 250% from 222 to 553).

9. Jackson, *supra* note 4, at A25.

10. See John Dwight Ingram, *The "Expected or Intended" Exclusion Clause in Liability Insurance Policies: What Should It Exclude?*, 13 WHITTIER L. REV. 713, 713 (1992).

11. See *Bilbo v. Shelter Ins. Co.*, 698 So. 2d 691, 694 (La. Ct. App. 1997).

12. See *id.*

13. See *Country Mut. Ins. Co. v. Hagan*, 698 N.E.2d 271 (Ill. App. Ct. 1998).

Although a clear majority of courts in other jurisdictions infer intent when the insured is an adult, the courts are evenly split with respect to the extension of this inference to minors. While a slight majority of courts are willing to infer as a matter of law that a minor insured who sexually abuses another minor does so intentionally, almost as many jurisdictions have refused to extend the presumption of intent to minor insureds.

Id. at 276 (citations omitted); see also *Fire Ins. Exch. v. Diehl*, 545 N.W.2d 602, 607 (Mich. 1996); David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 TORT & INS. L. J. 699, 737 (1995); Carolyn L. Mueller, *Ohio Homeowners Beware: Your Homeowner's Insurance Premium May Be Subsidizing Child Sexual Abuse*, 20 U. DAYTON L. REV. 341, 351-55 (1994);

acts by minors has expanded in recent years and advocates excluding shootings, assaults, and arson committed by minors from insurance coverage.

I. THE HOMEOWNERS INSURANCE POLICY

The overall purpose of a homeowners insurance policy is to “protect [an] insured from financial loss resulting from his legal liability for injuries to [] property or person[s]” from events beyond his control.¹⁴ The policy is designed to cover an insured when legal “liability result[s] from unintentional and unexpected injuries.”¹⁵ To accomplish this overall purpose, policies are generally written on an occurrence basis.¹⁶ An occurrence is typically defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”¹⁷ Although the word “accident” is not usually a defined term within the policy, courts have defined it as “occurs unexpectedly or by chance,” or “happens without intent or through carelessness.”¹⁸ Thus, a homeowners policy, through the definition of occurrence, excludes intentional acts that result in intentional injuries or damage.

In recent years, insurance companies have also added a separate policy exclusion reinforcing the occurrence definition.¹⁹ Typically, the policy exclusion states that personal liability coverage does not apply to bodily injury or property damage which is either expected or intended by an insured.²⁰ This exclusion applies to all insureds regardless of age. Some insurance companies vary the exclusion language slightly. For instance, Allstate Insurance Company sometimes includes the word “reasonably” and therefore does not cover bodily injury that may *reasonably* be expected to result from intentional acts of an insured person.²¹ The impact of adding the word “reasonably” to the policy

Danne W. Webb, *Intentional Acts and Injuries for Purposes of Insurance Coverage*, 52 J. MO. B. 41, 41-42 (1996).

14. Ingram, *supra* note 10, at 713.

15. *Id.* at 714.

16. See Michael F. Aylward, *Does Crime Pay? Insurance for Criminal Acts*, 65 DEF. COUNS. J. 185, 185-86 (1998).

17. *Id.* at 185-86 (quoting *Giddings v. Industrial Indem. Co.*, 169 Cal. Rptr. 278, 280 (Cal. Ct. App. 1980)).

18. *Id.* at 186 (quoting *Giddings*, 169 Cal. Rptr. at 280); see also *Farmers Alliance Mut. Ins. Co. v. Salazar*, 77 F.3d 1291, 1297 (10th Cir. 1996) (“[T]he words, ‘accident’ and ‘accidental’ have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally.” (quoting *United States Fidelity & Guar. Co. v. Briscoe*, 239 P.2d 754, 756 (Okla. 1951))).

19. See Aylward, *supra* note 16, at 186.

20. See *Western Mut. Ins. Co. v. Yamamoto*, 35 Cal. Rptr. 2d 698, 701-02 (Cal. Ct. App. 1994); *Shelter Mut. Ins. Co. v. Williams*, 804 P.2d 1374, 1376 (Kan. 1991).

21. See *Allstate Ins. Co. v. Dillard*, 859 F. Supp. 1501, 1502 (M.D. Ga. 1994), *aff’d*, 70 F.3d 1285 (11th Cir. 1995); see also *Allstate Ins. Co. v. Stamp*, 588 A.2d 363, 364 (N.H. 1991).

language is to require the use of an objective test, a reasonable person standard, in determining whether the result was expected. Another modification, viewing intentional acts from the standpoint of the insured, can change the required test from an objective to a subjective standard. Courts interpreting the clause, "[t]his policy does not apply . . . to bodily injury or property damage which is either expected or intended from the *standpoint of the insured*,"²² look at the intent of the insured in determining whether the intentional acts exclusion applies.²³

Language commonly found in insurance policies effective prior to the 1980s excluded bodily injury or property damage *caused intentionally by or at the direction of the insured*.²⁴ Some courts find there is no significant difference between the language most commonly used today and the older "caused intentionally" language.²⁵

The policy exclusion language currently used supports numerous public policy goals. It supports societal interests against shielding a person from the consequences of intentional acts he or she commits.²⁶ For instance, a major consequence of an intentional act is payment to the victim. Public policy supports making the individual responsible for the financial consequences of his or her own intentional act.²⁷ In turn, by placing financial responsibility on an insured rather than on the insurance company, the public partially achieves its objectives of punishing and deterring those acting against societal interests.²⁸

Other, perhaps less important, public policy goals are also met. Excluding intentional acts from insurance coverage meets the reasonable expectations of the contracting parties, especially where no intention or expectation was expressed.²⁹ In addition, the exclusion puts insureds on notice that an otherwise compensable loss will not be covered if the insured intentionally commits an act that causes injury.³⁰ Finally, an intentional acts exclusion serves to keep the financial burden from being levied against the general public.³¹

22. Bell v. Tilton, 674 P.2d 468, 470, 477 (Kan. 1983) (emphasis added).

23. See *id.*; see also State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364, 365-66 (Neb. 1973).

24. See Hartford Fire Ins. Co. v. Wagner, 207 N.W.2d 354, 355 (Minn. 1973); see also Hawkeye Sec. Ins. Co. v. Shields, 187 N.W.2d 894, 897 (Mich. Ct. App. 1971); Connecticut Indem. Co. v. Nestor, 145 N.W.2d 399, 400 (Mich. Ct. App. 1966).

25. See Ingram, *supra* note 10, at 715 ("These courts reason that making a distinction between the legal consequences of these two terms would be inconsistent with a layman's reasonable expectations."); see also Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 n.3 (Minn. 1978).

26. See Ingram, *supra* note 10, at 713.

27. See Shelter Mut. Ins. Co. v. Williams, 804 P.2d 1374, 1382 (Kan. 1991).

28. See Ingram, *supra* note 10, at 720.

29. See Prosser v. Leuck, 539 N.W.2d 466, 467-68 (Wis. Ct. App. 1995).

30. See Miller v. Fidelity-Phoenix Ins. Co., 231 S.E.2d 701, 704 (S.C. 1977) (Littlejohn, J., dissenting).

31. See Ingram, *supra* note 10, at 720 ("[W]hen an insurer is required to pay certain claims, the burden ultimately comes to rest on the public generally, since such costs are inevitably passed

On the other hand, commonly used policy language does not satisfy other public policy goals. By denying insurance coverage for intentional acts, innocent victims may not be compensated, especially if the insured lacks personal financial resources.³² Also, the goal of spreading the risk and cost of injuries to all insurance policyholders is not realized by excluding intentional acts from insurance coverage.³³

When minors commit intentional acts, the societal goals of punishment and deterrence through the imposition of financial consequences may have little impact on minors' anti-social conduct.³⁴ Children rarely have the financial resources to compensate victims. Public policy goals of reasonable and consistent expectations between contracting parties and notice to insureds are also less likely to be achieved. While minors are insureds, they are usually covered under their parents' insurance policies. Consequently, they may be unaware of the reasonable coverage expectations between their parents, the insurance company, and third parties. In addition, minors, because they are not named insureds, are also not typically provided direct notice of insurance policy language.

In addition to the compensation of victims and spread of risk goals that support coverage for intentional acts, society also values protecting young children from the consequences of their conduct.³⁵ Hence, public policy goals supporting coverage for minors' intentional acts may outweigh societal interests in excluding coverage.

II. TESTS USED TO DETERMINE IF AN INTENTIONAL ACT IS COVERED

Most of the tests used to determine if an intentional act is covered by a homeowner's insurance policy center on the insured's intent. This is particularly at issue in claims involving minors. One argument for allowing coverage is that minors cannot understand the consequences of their actions and are not sufficiently mature to form intent.³⁶ Some courts conclusively presume that a

on to the buyers of insurance and most people are insured.").

32. See *id.* at 719; see also James M. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 96-99 (1990) (discussing the reasons for the increased significance of the intentional acts exclusion and the dominance of the compensatory goal).

33. See Ingram, *supra* note 10, at 719.

34. Some courts have excluded the financial risk to parents whose child has committed an intentional act by finding separate insurance coverage for negligent supervision claims against parents. See Aylward, *supra* note 16, at 190 ("In most cases, the resolution of such claims will turn on whether operative exclusions apply to 'the' insured or 'any' insured. Where exclusions are specifically limited to harm that was expected or intended by 'the' insured, courts often have found coverage.").

35. See Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323, 1330 (1993).

36. See Aylward, *supra* note 16, at 195.

child under a certain age cannot form intent. For example, in *Carey v. Reeve*,³⁷ the court did not discuss the issue of whether the act may have been intentional because of a conclusive presumption that children under six years of age cannot form the intent to harm others.³⁸ For the most part, the presumption is applied in cases of children who are younger than eight years old.³⁹

However, the majority of courts do not conclusively presume a lack of intent in children of particular ages,⁴⁰ but rather use tests to determine the child's intent. Even courts that apply a conclusive presumption utilize a variety of tests to determine intent in children above certain ages. These tests are the same tests used to determine intent in adults. The test used by the majority of courts requires that two conditions be satisfied in order to trigger the intentional acts exclusion: (1) the insured intended to do the act that caused the injury, and (2) the insured intended to cause some kind of injury.⁴¹ Typically, the second part of the test is the main issue when determining if coverage exists under a homeowners insurance policy.⁴²

Intent can be actual or inferred.⁴³ Actual intent to cause injury is determined either by an objective or a subjective standard.⁴⁴ An objective standard invokes a reasonable person test: "whether a reasonable person, standing in the shoes of the insured, would have expected or intended the injuries to occur."⁴⁵ A subjective standard focuses on the specific insured and whether she intended to

37. 781 P.2d 904 (Wash. Ct. App. 1989).

38. *See id.* at 907 n.3 (finding no intent to harm others where a four-and-one-half-year-old child participated in an act in which another young child was burned).

39. *See Bartoletti v. Kushner*, 231 S.E.2d 358, 358-59 (Ga. Ct. App. 1976) (holding that a child one month short of 12 years of age is under the age of criminal responsibility and immune from a tort suit); *Scarboro v. Lauk*, 210 S.E.2d 848, 850 (Ga. Ct. App. 1974) ("The defendant child being six years of age at the time of the alleged tort was, as a matter of law, not liable therefore even though wilful."); *Queen Ins. Co. v. Hammond*, 132 N.W.2d 792, 793 (Mich. 1965) (precluding liability to children under seven years of age for intentional torts); *DeLuca v. Bowden*, 329 N.E.2d 109, 112 (Ohio 1975) ("[C]hildren under the age of seven also should not be held liable for intentional torts."). *But see Horton v. Reaves*, 526 P.2d 304, 307 (Colo. 1974) (applying an intent test requiring commission of an intentional act and an intent to make harmful contact to a three and four-year-old who admitted to dropping a baby that resulted in crushing the baby's skull); *Seaburg v. Williams*, 161 N.E.2d 576, 577 (Ill. App. Ct. 1959) (finding that whether a six-year-old who set a fire had intent is a fact question). For a summary of states decisions, see Donald Paul Duffala, Annotation, *Modern Trends as to Tort Liability of Child of Tender Years*, 27 A.L.R. 4th 15, 15 (1981).

40. *See Duffala, supra* note 39, at 15.

41. *See Amco Ins. Co. v. Haht*, 490 N.W.2d 843, 845 (Iowa 1992).

42. *See id.*; *see also Farmer in the Dell Enters., Inc. v. Farmers Mut. Ins. Co. of Del., Inc.*, 514 A.2d 1097, 1100 (Del. 1986); *Physicians Ins. Co. v. Swanson*, 569 N.E.2d 906, 911 (Ohio 1991).

43. *See Haht*, 490 N.W.2d at 845.

44. *See Aylward, supra* note 16, at 186.

45. *Id.*

cause harm.⁴⁶ Age is a factor in determining intent under both the objective and subjective intent standards.⁴⁷

Intent can also be inferred as a matter of law.⁴⁸ It may be inferred both from the nature of the act and the accompanying foreseeability of harm.⁴⁹ For example, many jurisdictions infer intent as a matter of law in cases of sexual molestation of children, regardless of whether the act is committed by an adult or minor,⁵⁰ because the act of sexual molestation is inherently harmful.⁵¹ Ohio courts have also extend the inferred intent rule to gunshots at point blank range.⁵²

Once a court finds actual or inferred intent to cause injury, most consider differences in magnitude or character between the actual injury and the intended injury immaterial in determining whether insurance coverage exists.⁵³ For example, in *Hartford Fire Insurance Co. v. Wagner*,⁵⁴ a fifteen-year-old boy shot his friend to cover up some burglaries they had committed together.⁵⁵ The boy only intended to wound his friend by shooting him in the stomach but the bullet hit his friend's heart and he died.⁵⁶ The court found the act of shooting was intended but the actual, more serious, injury was not.⁵⁷ However, the court held that even though only a wound, rather than death, was intended, the intentional acts exclusion in the homeowners insurance policy applied, excluding insurance compensation.⁵⁸ The two-part majority test, containing both the actual and inferred intent standards, is "well-established, well-reasoned, consistent with the parties' reasonable expectations, and consistent with public policy."⁵⁹

46. *See id.*

47. *See id.*

48. *See id.*

49. *See Amco Ins. Co. v. Haht*, 490 N.W.2d 843, 845 (Iowa 1992). *But see Gouger v. Hardtke*, 482 N.W.2d 84, 89 (Wis. 1991) (outlining a somewhat different test for inferred intent; whether the act is intentional and substantially certain to cause injury).

50. *See Country Mut. Ins. Co. v. Hagan*, 698 N.E.2d 271, 276-77 (Ill. App. Ct. 1998).

51. *See id.* at 276.

52. *See, e.g., Michigan Millers Ins. Co. v. Anspach*, 672 N.E.2d 1042, 1048 (Ohio Ct. App. 1996).

53. *See, e.g., Parkinson v. Farmers Ins. Co.*, 594 P.2d 1039, 1041 (Ariz. Ct. App. 1979) ("Although the exclusion is inapplicable when the perpetrator acts without any intent or expectation of causing injury, it is applicable when he acts with an intent to cause injury but the actual injury differs from the one intended or expected.") (citations omitted); *Haht*, 490 N.W.2d at 845; *Easley v. American Family Mut. Ins. Co.*, 847 S.W.2d 811, 814 (Mo. Ct. App. 1992) (holding that insured's desire to limit the victim's injury to a bloody nose instead of the serious cuts he received was of no consequence; all that was required was insured's intent to injure the victim).

54. 207 N.W.2d 354 (Minn. 1973).

55. *See id.* at 355.

56. *See id.*

57. *See id.*

58. *See id.*

59. Paige E. Fiedler, Case Note, 42 DRAKE L. REV. 921, 924 (1993).

The test used by a minority of courts follows classic tort doctrine.⁶⁰ It looks to the "natural and probable consequences of the insured's act."⁶¹ The minority view is similar to the majority view's inferred intent test in that both tests focus on the act itself and the probability or foreseeability of harm. Intent is not needed to determine whether insurance coverage applies under either the majority or minority test. Just as with the inferred intent standard in the majority test, age is not considered when applying the natural and probable consequences test. It is arguable that an injury resulting from a negligent act is often a natural or probable consequence of the act and thus, not covered by insurance under the minority view. Thus, the minority view has been criticized because it only allows insurance coverage for acts when the insured is not negligent.⁶²

Another view that has received little support⁶³ requires that the insured has specific intent to cause the type of injury suffered.⁶⁴ New Hampshire courts adhere to this view.⁶⁵ Although they recognize their approach represents a minority view, the New Hampshire courts, adhering to the principle of stare decisis, refuse to overrule previous decisions.⁶⁶ They put the onus on insurance companies to draft a carefully written exclusion in order to avoid the specific intent test.⁶⁷

These three tests are applied to both the homeowners policy's definition of occurrence and the intentional acts exclusion.⁶⁸ An insurance company may argue to exclude an act under both the policy's definition of occurrence and the intentional acts exclusion. Alternatively, an insurance policy may be written on an occurrence basis but may not contain an intentional acts exclusion. In these cases, courts have treated the occurrence definition and the intentional acts exclusion as establishing essentially the same limits on liability insurance coverage.⁶⁹ The Ohio Supreme Court compared an insurance policy containing the intentional acts exclusion with another policy limiting coverage to accidents and declared "the 'effect of both policies is the same' and they should be treated 'in like manner.'"⁷⁰

60. See, e.g., *Pachucki v. Republic Ins. Co.*, 278 N.W.2d 898, 901 (Wis. 1979).

61. *Id.*

62. See *Fiedler*, *supra* note 59, at 924.

63. See *id.*

64. See *Pachucki*, 278 N.W.2d at 901.

65. See *Providence Mut. Fire Ins. Co. v. Scanlon*, 638 A.2d 1246, 1247-48 (N.H. 1994).

66. See *id.* at 1248.

67. See *id.*

68. See, e.g., *Physicians Ins. Co. v. Swanson*, 569 N.E.2d 906, 908 (Ohio 1991); *Willis v. Campbell*, No. 97-CA-57, 1998 WL 46685, at *3 (Ohio Ct. App. Feb. 6, 1998).

69. See *Swanson*, 569 N.E.2d at 908.

70. *Id.* (citation omitted).

III. RECENT APPLICATIONS OF THE TESTS TO INTENTIONAL ACTS COMMITTED BY MINORS

A. Shootings with BB Guns

Although a BB gun is not considered a firearm, it is capable of shooting a pellet with enough force to cause severe injury.⁷¹ Courts are divided on whether shootings involving BB guns are excluded from insurance coverage.⁷² The decisions in the majority of cases hinge on the subjective intent of the minor shooter to cause injury, although two cases infer intent due to the certainty of the injury.⁷³ In *Bell v. Tilton*,⁷⁴ an eleven-year-old boy participated in a game where he shot at other children from approximately thirty feet away as they raced across an open doorway. The shooter aimed directly at the children as they ran from side to side.⁷⁵ A BB hit one of the children in the eye causing a severe injury.⁷⁶ The court stated, "the act of shooting another in the face with a BB pellet is one which is recognized as an act so certain to cause a particular kind of harm it can be said an actor who performed the act intended the resulting harm. . . ."⁷⁷ Thus, the minor's act was not covered by insurance.⁷⁸

A more recent decision broadens the circumstances under which intent can be inferred. In 1992, the Court of Appeals of Iowa found intent to cause bodily injury when a person shoots a BB in the direction of another person.⁷⁹ The court stated that intent can be inferred as a matter of law because of the inherent harm

71. See *Bell v. Tilton*, 674 P.2d 468, 476 (Kan. 1983). Approximately 33,000 people are injured each year by BB or pellet guns. See *Health Updates*, SALT LAKE TRIB., Aug. 17, 1995, at C1. Eighty percent of these injuries are to children between the ages of five and nineteen. See *id.* Over 2000 of the injuries require hospitalization. See *id.*

72. Decisions that find insurance coverage applies include *State Farm Fire & Casualty Co. v. Muth*, 207 N.W.2d 364 (Neb. 1973); *Providence Mutual Fire Insurance Co. v. Scanlon*, 638 A.2d 1246 (N.H. 1994); *Physicians Insurance Co. v. Swanson*, 569 N.E.2d 906 (Ohio 1991). Decisions holding insurance coverage does not apply include *American Family Mutual Insurance Co. v. Wubbena*, 496 N.W.2d 783 (Iowa Ct. App. 1992); *Bell v. Tilton*, 674 P.2d 468 (Kan. 1983); *Chapman v. Wisconsin Physicians Service Insurance Corp.*, 523 N.W.2d 152 (Wis. Ct. App. 1994).

73. See *Bell*, 674 P.2d at 477; *Wubbena*, 496 N.W.2d at 785.

74. 674 P.2d 468, 470 (Kan. 1983).

75. See *id.*

76. See *id.*

77. *Id.* at 477. However, in this case, the court did not find that the 11-year-old had aimed directly at the victim's face. Instead of inferring intent, the court applied a subjective test and excluded the act from insurance coverage by finding that the minor had either the desire to cause the consequences of his act or believed the consequences were substantially certain to result. See *id.*

78. See *id.*

79. See *American Family Mut. Ins. Co. v. Wubbena*, 496 N.W.2d 783, 785 (Iowa Ct. App. 1992).

found in the act of shooting a BB gun and the foreseeability of the harm accompanying such an act.⁸⁰ The case involved a fifteen-year-old boy who, with friends, was shooting BB pellets at cans.⁸¹ The boys began to scuffle and the fifteen-year-old told his friend, "I'm going to get you."⁸² He then fired two shots in the direction of his friend from eighty to ninety feet away, striking his friend in the eye.⁸³ The court broadened the decision in *Bell* by inferring intent to injure not only when the shooter aims directly at his victim's face, but also when shots are fired in the direction of the victim from a substantial distance.⁸⁴

Another recent decision did not infer intent as a matter of law, but reached the same result by looking at the subjective intent of the minor shooter.⁸⁵ The case involved a fourteen-year-old boy who was playing a BB gun war game with friends.⁸⁶ During the game he aimed in the general direction of his friend, from approximately seventy-five feet away, and fired, injuring his friend in the eye.⁸⁷ He did not take careful aim nor could he see his friend clearly as he fired.⁸⁸ The minor insured believed the shot would cause a sting but nothing more serious.⁸⁹ The court applied the majority view test and found intent to injure because the minor insured knew injury (a sting) would result from the shot.⁹⁰ It did not matter that the resulting injury to the eye was different from the intended sting injury.⁹¹ In general, courts that believe that a BB gunshot is likely to injure find intent regardless of the age of the shooter and whether the shot is aimed directly at the victim.

On the other hand, a New Hampshire decision specifically found that the act of shooting with a BB gun is not certain to result in some type of injury.⁹² The court applied a subjective intent standard to find the sixteen-year-old had not intended injury.⁹³ The sixteen-year-old boy participated in a "game" where he and other boys shot at each other from about fifty feet away.⁹⁴ During the game,

80. *See id.*

81. *See id.* at 783.

82. *Id.*

83. *See id.*

84. *See id.* at 785.

85. *See Chapman v. Wisconsin Physicians Serv. Ins. Corp.*, 523 N.W.2d 152, 154 (Wis. Ct. App. 1994); *see also Bell v. Tilton*, 674 P.2d 468, 477 (Kan. 1983).

86. *See Chapman*, 523 N.W.2d at 153-54.

87. *See id.* at 154.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*; *see also State Farm Fire & Cas. Co. v. Muth*, 207 N.W.2d 364, 366 (Neb. 1973); *supra* text accompanying notes 49-59. *But see Providence Mut. Fire Ins. Co. v. Scanlon*, 638 A.2d 1246, 1247-48 (N.H. 1994) (holding the intentional acts exclusion is met only if the insured actually intended the particular injury).

92. *See Scanlon*, 638 A.2d at 1249.

93. *See id.*

94. *See id.* at 1247.

which lasted about an hour, three boys were hit by BB pellets without incurring injury. However, a later shot by the sixteen-year-old, from a distance of eighty to ninety feet, hit another boy in the eye.⁹⁵ In deciding that intent could not be inferred and that the minor insured did not intend to cause injury, the court relied heavily on the fact that three previous shots had not caused an injury.⁹⁶

The Ohio Supreme Court has also found that injury from a BB gun shot is not substantially certain to occur.⁹⁷ Thus, intent to injure was not inferred and the court looked at the minor's subjective intent.⁹⁸ A teenage boy responding to a previous unfriendly encounter with a group of young adults shot his BB gun three times in the direction of the group.⁹⁹ A member of the group was hit and subsequently lost his right eye.¹⁰⁰ The teenage boy was approximately seventy to one-hundred feet away from the group and testified that he was aiming at a sign about fifteen to twenty feet away from the group.¹⁰¹ He also testified that his objective in shooting was to scare the group of young adults.¹⁰² While the court (applying the majority-view subjective test) found the act intentional, the court was persuaded that the insured did not intend to injure the victim. Thus, the court held the intentional acts exclusion did not apply.¹⁰³

Finally, the Nebraska Supreme Court also held that a minor's act of firing a BB gun, from a slow moving car, in the direction of the victim is not excluded from insurance coverage.¹⁰⁴ The trial court found that the minor did not take careful aim and that he fired only to scare someone.¹⁰⁵ However, the court distinguished between types of acts that by their nature will likely cause harm and other acts where harm is unexpected, and placed this BB gun shooting in the latter category.¹⁰⁶ The court then employed the subjective intent to injure standard and held that the minor did not intend to injure based on the trial court findings.¹⁰⁷

Although age can be a factor in determining subjective intent, none of the courts specifically address age as an issue. Instead, courts seem divided over whether a BB gun is substantially certain to cause injury. Courts who accept that

95. *See id.*

96. *See id.* at 1249.

97. *See Physicians Ins. Co. Ohio v. Swanson*, 569 N.E.2d 906, 911 (Ohio 1991).

98. *See id.*

99. *See id.* at 907.

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* at 911.

104. *See State Farm Fire & Cas. Co. v. Muth*, 207 N.W.2d 364, 366 (Neb. 1973).

105. The court did not state that the trial judge's findings were incorrect but hinted that in reviewing the evidence they might have come to a different conclusion. *See id.* There was conflicting evidence presented from which the trial court could have found that the minor aimed at the car's occupant and intended to hit him. *See id.* at 365.

106. *See id.* at 367.

107. *See id.* at 366.

a BB gun pellet is likely to harm hold the intentional acts exclusion applies. Courts that do not accept the substantial certainty proposition delve into the insured's subjective intent and are willing to find insurance coverage for shooters who only intend to scare their victims or where previous shots fired from a BB gun have not resulted in injury.

B. Shootings with Firearms

Even more dangerous than shooting a BB gun is shooting a firearm. Most courts recognize the foreseeability of causing harm by shooting a gun, and while applying different tests, courts utilize either the occurrence definition or the intentional acts exclusion to exclude such acts from homeowners insurance coverage. In two recent cases, insureds have appealed lower court judgments in favor of insurance carriers contending that the shootings were within the policy's definition of occurrence.¹⁰⁸ In *Farmers Alliance Mutual Insurance Co. v. Salazar*,¹⁰⁹ a sixteen-year-old boy gave a friend his gun. Later, the boy and his friend instigated a dispute with some other youths.¹¹⁰ The argument escalated and the insured's friend fired at least one shot into another youth's vehicle, killing the vehicle owner. The victim's mother brought a wrongful death suit against the minor insured, alleging negligent entrustment of the minor's gun to his friend.¹¹¹ The minor's insurance carrier then initiated a declaratory judgment action to determine whether it had an obligation to defend or indemnify the minor insured.¹¹² On appeal, the circuit court ruled in favor of the insurance company.¹¹³ In its decision, the court held that the insured's participation in the intentional murder of the victim by the insured's friend was not an accident and therefore not within the policy's occurrence definition.¹¹⁴ The court defined "an accident as an event from an unknown cause, or an unexpected event from a known cause."¹¹⁵ In so ruling, the court appears to have adopted an inferred intent test—the act of shooting where a death occurs is not unexpected or unforeseeable, and thus intent is inferred.¹¹⁶

Similarly, in shootings involving injury other than death, courts are still

108. See *Farmers Alliance Mut. Ins. Co. v. Salazar*, 77 F.3d 1291, 1294 (10th Cir. 1996) (applying Oklahoma law); *Worrell v. Daniel*, 698 N.E.2d 494, 497 (Ohio Ct. App. 1997).

109. See *id.* at 1294.

110. *Salazar*, 77 F.3d at 1293.

111. See *id.* at 1293 n.1.

112. See *id.* at 1293.

113. See *id.* at 1297.

114. See *id.*

115. *Id.* (quoting *United States Fidelity & Guar. Co. v. Briscoe*, 239 P.2d 754, 756 (Okla. 1951)).

116. Accord *Worrell v. Daniel*, 698 N.E.2d 494, 499 (Ohio Ct. App. 1997) (relying on the analysis used in *Farmers Alliance Mutual Insurance Co. v. Salazar*, the court held that any claims resulting from a minor's killing of his victim by shooting and striking her with a brick are precluded from coverage because the act was intentional and did not constitute an occurrence).

unwilling to find insurance coverage. This is true whether the insured fires directly at the victim¹¹⁷ or fires at the victim's car.¹¹⁸ Applying the majority view test and using an objective standard, a Georgia court found that a reasonable thirteen-year-old should have anticipated that intentionally aiming and firing a revolver near a person's head would result in a bullet wound.¹¹⁹ Hence, insurance did not cover the injury because it was a reasonably expected result of an intentional act.¹²⁰ The court was required to apply an objective standard because the policy would not "cover any bodily injury which may *reasonably* be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person."¹²¹

The same court also applied a subjective standard under the majority view test and still found no coverage for the shooting.¹²² In its discussion, the court considered the minor's age but, nevertheless, found that the act was intentional because of the boy's statements prior to the shooting and his careful aim when shooting.¹²³ In conjunction with the intentional act, the court held that the thirteen-year-old's statements showed his appreciation of the probable and foreseeable results of his intentional act.¹²⁴ The two elements of the majority view test, intent to do the act and intent to cause injury, were satisfied. Therefore, under both the objective and subjective intent to injure standards, the court held that the homeowner's insurance policy excluded injury resulting from the thirteen-year-old's act of shooting directly at a victim.¹²⁵

Similarly, an Ohio court applied the majority view test and found a fourteen-year-old's act of shooting at a car was substantially certain to cause injury and, thereby, excluded from homeowners coverage.¹²⁶ The fourteen-year-old boy

117. See *Allstate Ins. Co. v. Dillard*, 859 F. Supp. 1501 (M.D. Ga. 1994), *aff'd*, 70 F.3d 1285 (11th Cir. 1995).

118. See *Willis v. Campbell*, No. 97-CA-57, 1998 WL 46685, at *1 (Ohio Ct. App. Feb. 6, 1998).

119. See *Dillard*, 859 F. Supp. at 1504.

120. See *id.*

121. *Id.* at 1502, 1503 (emphasis added).

122. See *id.*

123. See *id.* The boy asked the other kids he was playing with before the shooting, "[W]hich one of you wants to feel what it's like to be shot." *Id.* at 1502 (quoting from the Trial Transcript, p. 36).

124. See *id.* at 1503.

125. See *id.* at 1504; see also *Western Mut. Ins. Co. v. Yamamoto*, 35 Cal. Rptr. 2d 698, 700, 704 (Cal. Ct. App. 1994) (holding that a minor who shot a person, who was within six or seven feet of the minor, several times hitting him in both arms acted with intent to commit great bodily injury). But see *Putnam v. Zeluff*, 127 N.W.2d 374, 376 (Mich. 1964) (holding that a minor's act of shooting at a dog whom the minor considered wild, with only the intent to protect himself from attack, was covered by insurance).

126. See *Willis v. Campbell*, No. 97-CA-57, 1998 WL 46685, at *3 (Ohio Ct. App. Feb. 6, 1998).

fired a number of rifle shots at a car and injured another boy.¹²⁷ Both boys testified that the minor insured was aiming at the car, not the victim, and the injury to the other boy was accidental. However, the court held that a reasonable person knows that firing a rifle four or more times into an occupied car is substantially certain to result in injury to the occupants.¹²⁸

The Supreme Court of New Hampshire hinted at an exception to labeling shooting with a firearm as an intentional act in *Allstate Insurance Co. v. Stamp*.¹²⁹ This court found a minor's act of aiming and firing a loaded firearm directly at a police officer is reasonably expected to cause injury.¹³⁰ However, the court intimated that the first part of the majority view test, intent to do the act, might not be met if the minor acted unconsciously or involuntarily.¹³¹

Intent is also frequently at issue in cases involving mentally ill persons.¹³² There are two conflicting lines of authority as to whether an act by an insured suffering from a mental illness is intentional and, thus, excluded from insurance coverage.¹³³ The first line of cases holds that the intentional acts exclusion does not apply to the act and its resulting injury if the insured suffers from a mental illness.¹³⁴ This body of cases finds insurance coverage for acts by mentally ill persons. The underlying public policy consideration is that a mentally ill person, who is unable to conform his conduct to acceptable standards, will not perform an act solely because insurance will not cover the resulting injury.¹³⁵ Therefore, applying the intentional acts exclusion is inappropriate because it does not deter a mentally ill person from engaging in anti-social conduct.¹³⁶ This position also reinforces society's interest in compensating victims.¹³⁷

The second line of cases excludes a mentally ill person's act from insurance coverage if the person understands the nature and consequences of his acts and had the intent to cause the injury.¹³⁸ An act by a mentally ill person can be excluded even if the insured is found criminally insane¹³⁹ or incapable of distinguishing right from wrong.¹⁴⁰ This line of authority broadens the definition

127. See *id.* at *1.

128. See *id.* at *3.

129. 588 A.2d 363, 365 (N.H. 1991).

130. See *id.*

131. See *id.*

132. See *Shelter Mut. Ins. Co. v. Williams*, 804 P.2d 1374, 1381 (Kan. 1991).

133. See *id.*

134. See *id.*

135. See *id.*

136. This same logic could be applied to children as well, although it is arguable whether children are able to conform their conduct to permissible standards.

137. See *Williams*, 804 P.2d at 1382.

138. See *id.* at 1381.

139. See *Economy Preferred Ins. Co. v. Mass*, 497 N.W.2d 6, 9 (Neb. 1993).

140. See *Williams*, 804 P.2d at 1381-82 (holding that a 14-year-old mentally ill boy's act of firing a rifle several times in school, thereby wounding teachers and students and killing the principal, was not covered by insurance because the boy understood the nature and quality of his

of intentional act, thereby excluding some acts by mentally ill persons from insurance coverage.¹⁴¹ Both lines of authority formulate an exception to the general rule excluding firearm shootings from insurance coverage. However, the exception is limited in its application to mentally ill minors, and in some cases only to mentally ill minors who do not intend to cause injury.¹⁴²

The cases consistently show that shootings with firearms are excluded from insurance coverage if the minor is a teenager who shoots in the victim's direction. A very limited exception may exist when the insured is mentally ill.¹⁴³ Still unanswered is whether firearm shootings by younger minors, between seven and twelve years old, will be excluded from insurance coverage. Whether an eight-year-old child intends injury to result from shooting a gun has yet to be decided on appeal. A decision involving another type of intentional act sheds some light on the question. In 1983, the Kansas Supreme Court held that an eleven-year-old who aims and shoots a BB gun at another intends to cause injury.¹⁴⁴ Using the subjective standard under the majority view test, the court found the eleven-year-old intended to injure when he aimed directly at the victim from thirty feet away.¹⁴⁵ The court decided that a BB gun pellet can injure and that an eleven-year-old can understand and intend injury when shooting a BB gun.¹⁴⁶ Applying this decision to firearm shootings, it is reasonable to infer that an eleven-year-old can intend to injure when shooting a gun.

If eleven-year-olds can form the intent to injure, then can younger minors likewise form that intent? None of the BB gun or firearm cases involve seven to ten-year-olds. However, an older court decision found a seven-year-old boy had committed a wilful battery when he shot an arrow in the general direction of a five-year-old girl and severely injured her eye.¹⁴⁷ The court considered a number

acts and intended to cause injury).

141. A third view is outlined by the Minnesota Supreme Court in *State Farm Fire & Casualty Co. v. Wicka*, 474 N.W.2d 324 (Minn. 1991). The court held, for the purpose of applying the intentional act exclusion in the homeowners insurance policy, that

an insured's acts are deemed unintentional where, because of mental illness or defect, the insured does not know the nature or wrongfulness of an act, or where, because of mental illness or defect, the insured is deprived of the ability to control his conduct regardless of any understanding of the nature of the act or its wrongfulness.

Id. at 331.

142. This exception also applies to mentally ill adults. See Aylward, *supra* note 16, at 193-94.

143. Another possible exception is self defense. See *Fire Ins. Exch. v. Berray*, 694 P.2d 191, 193 (Ariz. 1984) (holding, in a case involving an adult, that the insured's act of shooting a .357 Magnum firearm was committed in self defense and, thus, not an intentional act within the meaning of the insurance policy's exclusion).

144. See *Bell v. Tilton*, 674 P.2d 468, 477 (Kan. 1983).

145. See *id.*

146. See *id.*

147. See *Weisbart v. Flohr*, 67 Cal. Rptr. 114, 116 (Cal. Ct. App. 1968).

of factors in making its determination.¹⁴⁸ Several of the factors relate to intent to injure. The boy knew it was wrong to point an arrow at another person (his father had warned him never to shoot an arrow at anyone); he also knew a bow and arrow could be dangerous if used improperly.¹⁴⁹ These factors, along with the probability of injury when a gun is fired, can be used to determine a child's intent to injure when shooting a firearm at another person. Today, with the prevalence of media reports of shootings and television shows displaying violence, it would be difficult to prove that a young minor does not understand what will happen if he aims and shoots a gun directly at another person.¹⁵⁰ It is likely that a court, applying these factors coupled with the high probability of injury, will ultimately exclude firearm shootings by younger minors from insurance coverage.¹⁵¹

The other issue that has not been clearly decided by the courts involves random firearm shootings. Rather than just firing directly at a person, a minor shoots into the air or in the victim's general vicinity merely to scare him. Two of these BB gun cases center on the minor's intent to scare rather than to injure.¹⁵² Both of the courts distinguished acts where injury was substantially certain to occur from acts where injury was less likely to occur.¹⁵³ Because injury was not substantially certain to occur, the courts applied other tests to determine intent to injure.¹⁵⁴ However, it is more probable that injury will result from shooting a firearm, even randomly, than from shooting a BB gun. Still, even with a greater likelihood of injury, courts may find a younger child less likely to understand that a gunshot fired in the air or aimed at the wall has the potential to injure, and thus find insurance coverage for the intentional act.

C. Physical Assaults

Similar to acts involving firearms, physical assaults—punches—by teenagers are usually excluded from insurance. Regardless of which test is applied to determine intent to injure, the outcomes are consistent: a teenager intends to injure her victim whether she punches him many times, twice, or only once. Many of the cases, regardless of the number of punches infer intent as a matter

148. See *id.* at 119.

149. See *id.*

150. See Perrochet & Colella, *supra* note 35, at 1351 ("Research in child psychology now suggests that chronological age alone is an insufficient measure of a child's capacity to foresee the consequences of action and to . . . refrain from harming others.").

151. The same analysis can be applied to younger children who shoot BB guns, causing injury. However, courts are less certain as to the probability of injury when the act involves a BB gun. See *supra* text accompanying notes 71-107.

152. See *State Farm Fire & Cas. Co. v. Muth*, 207 N.W.2d 364 (Neb. 1973); *Physicians Ins. Co. v. Swanson*, 569 N.E.2d 906 (Ohio 1991).

153. See *supra* text accompanying notes 71-107; see also *Willis v. Campbell*, No. 97-CA-57, 1998 WL 46685, at *3 (Ohio Ct. App. Feb. 6, 1998).

154. See *supra* text accompanying notes 71-107.

of law because of the nature of the act and the accompanying foreseeability of harm.

The Iowa Supreme Court addressed the issue of repetitious blows in *American Family Mutual Insurance Co. v. De Groot*.¹⁵⁵ A thirteen-year-old babysitter became upset when a five-month-old child would not stop crying.¹⁵⁶ The babysitter struck the child's head on the floor three times and the baby died. The court applied the majority view test and held that the repetitive nature of the act (three blows) supported an inferred intent to injure.¹⁵⁷ As a result of the court's decision, insurance did not cover the babysitter's act or compensate the parents of the dead child.¹⁵⁸

Similarly, two punches may also infer an intent to injure. A minor's act of punching another boy two times, causing bones to fracture in the victim's face, convincingly shows an intention to cause bodily harm.¹⁵⁹ The court stated, "[p]unches or blows are intended to put the other person in pain and/or fear."¹⁶⁰ The court also addressed the extent of the injury. The minor argued that he did not intend to fracture bones in the victim's face.¹⁶¹ However, just as in cases involving BB guns¹⁶² and firearms,¹⁶³ the court held that even though the extent of the injury was greater than intended, the insurance policy's intentional acts exclusion still excluded coverage for the act of punching.¹⁶⁴

155. 543 N.W.2d 870 (Iowa 1996).

156. *See id.*

157. *See id.* at 872; *see also* State Farm Fire & Cas. Co. v. Bullock, No. 387111, 1997 WL 309584, at *5 (Conn. Super. Ct. May 30, 1997) (holding that the very nature of the act—pushing the victim to the ground, striking him multiple times, and causing him to lose consciousness—shows the harm to the injured party must have been intended). The Connecticut court also justified its decision based on reasonableness; a reasonable insured could not expect his insurance policy to pay for the injuries resulting from such a "fierce and brutal beating of another individual." *Id.* at *7 (citation omitted). In addition, the court discussed the public policy rationale; if these types of acts are covered, the liability policy could be used as a "license to wreak havoc at will." *Id.* (citation omitted). *See also* Allstate Ins. Co. v. Boonyam, 597 N.Y.S.2d 131, 132 (N.Y. App. Div. 1993) (upholding summary judgment for the insurer because the harm caused by repeatedly striking a 15-year-old in the head with a hammer and stabbing him in the chest is not within the insurance policy's coverage provisions).

158. The babysitter was covered under a farm liability policy. The policy's intentional acts exclusion language is identical to the typical language found in a homeowners policy. *See De Groot*, 543 N.W.2d at 870-71.

159. *See* Simpson v. Angel, 598 So. 2d 584, 585-86 (La. Ct. App. 1992).

160. *Id.* at 585.

161. *See id.*

162. *See supra* text accompanying notes 71-107.

163. *See supra* text accompanying notes 108-53.

164. *See* Simpson, 598 So. 2d at 585; *see also* Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 (Minn. 1978) (holding a 16-year-old's striking of another boy's head, which resulted in a continuing epileptic condition, was not covered by insurance even though the actual injury was more severe than the intended injury).

The majority of cases center around acts involving only one punch. Although the Louisiana court distinguishes two punches from one punch,¹⁶⁵ several courts have inferred intent to injure from just one blow.¹⁶⁶ The cases all involve surprise attacks. In *Fire Insurance Exchange v. Altieri*,¹⁶⁷ a fifteen-year-old boy put on a boxing glove, walked up behind a ninth grade boy, grabbed the boy's hair in his left hand, and punched the boy in the mouth with his right hand.¹⁶⁸ Although the boys had previously exchanged "words," the fifteen-year-old had left only to return later and punch the younger boy. A similar situation occurred in *Jones v. Norval*¹⁶⁹ where an eighteen-year-old had "words" with a twelfth grader. When the twelfth grader tried to leave, the minor insured struck him with his fist, breaking the twelfth grader's jaw and knocking him unconscious.¹⁷⁰ Finally, in *Clark v. Allstate Insurance Co.*, one high school student tapped another high school student, whom he did not know, on the back.¹⁷¹ As the boy turned around, the student struck him in the face, crushing the boy's cheekbone.¹⁷²

All three courts held that the nature of the acts inferred intent to injure.¹⁷³ Although the attackers each said they did not intend to seriously hurt their victims, the courts nevertheless found the acts inherently harmful.¹⁷⁴ The courts echoed the Nebraska Supreme Court's holding that, "[w]here an 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial."¹⁷⁵

Courts that do not infer intent as a matter of law often find intent to injure under either the objective or subjective standard used in the majority view test. In *Cavalier v. Suberville*,¹⁷⁶ a teenager, who had previously argued with a former friend, grabbed the friend from behind, turned him around, and punched him in the face. The punch broke several bones. The insurance policy's intentional acts exclusion included the word "reasonably" in its language and the court applied an objective standard.¹⁷⁷ The court held that any person would reasonably expect injury to result from the teenager's act and, thus, the intentional acts provision

165. "One punch, arguendo might be unintentional, but two punches certainly indicate an intention to cause bodily harm to the victim." *Simpson*, 598 So. 2d at 585-86.

166. See, e.g., *Clark v. Allstate Ins. Co.*, 529 P.2d 1195 (Ariz. Ct. App. 1975); *Fire Ins. Exch. v. Altieri*, 1 Cal. Rptr. 2d 360 (Cal. Ct. App. 1992); *Jones v. Norval*, 279 N.W.2d 388 (Neb. 1979).

167. 1 Cal. Rptr.2d 360 (Cal. Ct. App. 1992).

168. See *id.* at 362.

169. 279 N.W.2d 388, 389 (Neb. 1979).

170. See *id.* at 389-90.

171. See *Clark*, 529 P.2d at 1196.

172. See *id.*

173. See *id.*; *Altieri*, 1 Cal. Rptr. 2d at 365; *Jones*, 279 N.W.2d at 391.

174. See *Clark*, 529 P.2d at 1196; *Altieri*, 1 Cal. Rptr. 2d at 362; *Jones*, 279 N.W.2d at 390.

175. *Jones*, 279 N.W.2d at 392.

176. 592 So. 2d 506 (La. Ct. App. 1991).

177. See *id.* at 507.

excluded insurance coverage for the punch.¹⁷⁸

Even when using a subjective standard under the majority view test, the Missouri Court of Appeals held the insured's act of one punch is excluded from insurance coverage.¹⁷⁹ In *Easley*, two boys fought during a high school basketball practice.¹⁸⁰ After practice one of the boys waited outside for the other boy and hit him on the chin as he walked out of the school building. The boy fell backward and seriously injured his ear, nearly severing it from his head. The court found the minor attacker had acted wilfully and deliberately with intent to injure his victim.¹⁸¹ As in previous cases,¹⁸² the attacker's intent only to bloody the boy's nose or blacken his eye was of no consequence; intent to cause even a slight injury was all that was required.¹⁸³

Exceptions to the general rule excluding acts of punching from insurance coverage also revolve around the insured's intent to injure. In cases of self-defense the intentional acts exclusion may not apply.¹⁸⁴ In a South Carolina case, two high school boys engaged in a fist fight.¹⁸⁵ One of the boys was injured and sued the other participant. The court found that the victim provoked the fight and that the attacker was reacting to the victim when he struck him in the face.¹⁸⁶ Because the attacker only intended to protect himself and not to inflict a specific injury on the victim, the court cited self-defense and held that the intentional acts exclusion did not apply.¹⁸⁷

A recent case highlights the level of intent needed to cause an injury. In *Amco Insurance Co. v. Haht*,¹⁸⁸ an eleven-year-old boy struck another child with a baseball after a neighborhood game. The ball hit the child in the temple, causing death. The court applied the majority view test and held that the eleven-year-old's intent to hurt his playmate did not rise to the level of intent needed to

178. See *id.*; see also *Pendergraft v. Commercial Standard Fire & Marine Co.*, 342 F.2d 427, 429 (10th Cir. 1965).

179. See *Easley v. American Family Mut. Ins. Co.*, 847 S.W.2d 811, 814 (Mo. Ct. App. 1992).

180. See *id.* at 811.

181. See *id.* at 814.

182. See *supra* text accompanying notes 54-58, 85-91.

183. See *id.*; see also James E. Berger, Note, *Liability Insurers Get a Fair Deal*; *Easley v. American Family Mutual Insurance Co.*, 59 MO. L. REV. 209 (1994) (discussing Missouri law before and after the *Easley* decision and outlining the public policy goals that are advanced through use of the subjective standard).

184. See *Vermont Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417 (S.C. 1994).

185. See *id.* at 419.

186. See *id.* at 420.

187. See *id.* But see *Nationwide Mut. Fire Ins. Co. v. Mitchell*, 911 F. Supp. 230, 234 (S.D. Miss. 1995) (discussing the case of a 16-year-old boy hitting a woman who had pushed his mother). The court stated that "[i]t appears that the majority view does not allow self-defense as an exception to a policy's intentional-act exclusion when a punch, as here, is thrown with a purpose to injure." *Id.* at 231.

188. 490 N.W.2d 843, 844 (Iowa 1992).

cause bodily injury.¹⁸⁹ The court stated that, "[a]n eleven-year-old boy, animated by an obscure playground snit, lacks the same capacity to formulate an intent to injure that is possessed by an adult, or even a youth of more maturity."¹⁹⁰

The dissent in *Haht*¹⁹¹ takes issue with the majority carving out an exception for eleven-year-olds who injure others in playground disputes.¹⁹² Justice Snell argues that the majority's opinion results in a specific intent test: the insured must intend the specific injury suffered in order to apply the intentional acts exclusion.¹⁹³ The dissent points out that the majority's view promotes compassion for the victim but does not adhere to *stare decisis*.¹⁹⁴ Additionally, the dissent stresses that the decision leads to uncertainty as to what insurance companies are insuring against.¹⁹⁵

Courts find intent to injure when a teenager punches another. The nature of a punch is so certain to cause injury that intent to injure can be inferred or found through either the objective or the subjective tests. This is especially true when the punch is a surprise to the person who was hit and applies even when there were previous altercations between the parties.¹⁹⁶ In a very limited exception, when an insured minor hits another only to protect himself, the court may then find insurance coverage for injury.

Less clear is whether younger children, ages seven through twelve, form an intent to injure when punching or throwing an object at another child. The *Haht* court carved out an exception that could conceivably be applied to younger children.¹⁹⁷ The court found that younger children do not have the same capacity

189. See *id.* at 845; see also *American Ins. Co. v. Saulnier*, 242 F. Supp. 257, 261 (D. Conn. 1965) (finding that the intentional acts exclusion did not apply when a 13-year-old boy threw a Coke bottle and hit another child because he only intended to frighten rather than injure); *Walker v. Kelly*, 314 A.2d 785, 788 (Conn. Cir. Ct. 1973) (holding that a five-year-old did not wilfully or maliciously intend to injure another child when she threw a rock at him); *Hawkeye Sec. Ins. Co. v. Shields*, 187 N.W.2d 894, 901 (Mich. Ct. App. 1971) (holding under an insurance policy excluding acts for bodily injury caused intentionally or at the direction of the insured, that the exclusion did not apply when the insured minor hit the young man in the shoulder and/or chest area while another boy kicked him in the testicles and the injury suffered by the young man was to his testicles). But see *Waters v. Blackshear*, 591 N.E.2d 184, 185 (Mass. 1992) (finding that a minor less than 10 years old intended harmful contact when he placed a fire cracker in a seven-year-old's shoe).

190. *Haht*, 490 N.W.2d at 845.

191. See *id.* at 846 (Snell, J., dissenting); see also Paul B. Ahlers, Note, *Amco Insurance Co. v. Haht: Iowa's Definition of Insurance Intent*, 79 IOWA L. REV. 203 (1993) (questioning the validity of the court's decision).

192. See *Haht*, 490 N.W.2d at 847 (Snell, J., dissenting).

193. See *id.* at 846.

194. See *id.* at 847-48.

195. See *id.* at 846.

196. See *supra* text accompanying notes 165-83.

197. See *Haht*, 490 N.W.2d at 845.

to formulate an intent to injure as is possessed by a more mature youth.¹⁹⁸ Most children know that a hit, either by using a fist or by throwing an object, is going to hurt because they have received such a hit at one time or another. But whether a younger child understands that a physical injury is likely to occur, as a result of the hit or throw, is questionable. Unlike punches by teenagers where intent is often inferred,¹⁹⁹ the younger minor's intelligence, maturity, past experiences and conduct, and the circumstances surrounding the hit may assist in determining whether intent to injure exists. However, public policy may offset such considerations.²⁰⁰ Social norms support the belief that anti-social conduct should not be rewarded.²⁰¹ All people, even young children, should face the consequences of their actions.

D. Arson

Unlike the cases in the other categories that caused bodily injury, virtually all the cases involving arsons resulted only in property damage. Perhaps this is one of the reasons the case decisions are split fairly evenly between not insuring²⁰² and insuring²⁰³ intentional acts of setting fires. Age also appears to be a more significant factor in determining intent to injure.

As in some of the firearm shooting cases,²⁰⁴ an Ohio appellate court excluded a fire set by a high school student from insurance coverage by applying the occurrence definition.²⁰⁵ A high school student used a lighter to set fire to a

198. See *id.*

199. See *supra* text accompanying notes 155-83.

200. See *supra* text accompanying notes 29-35.

201. See *supra* text accompanying notes 26-28.

202. Cases which exclude acts of setting fires from insurance coverage include: *United States Fidelity & Guaranty Co. v. American Employers' Insurance Co.*, 205 Cal. Rptr. 460 (Cal. Ct. App. 1984); *Home Insurance Co. v. Aetna Life & Casualty Co.*, 663 A.2d 1001 (Conn. 1995); *Farmer in the Dell Enterprises, Inc. v. Farmers Mutual Insurance Co. of Delaware, Inc.*, 514 A.2d 1097 (Del. 1986); *Farmers Automobile Insurance Ass'n v. Medina*, 329 N.E.2d 430 (Ill. App. Ct. 1975); *City of Newton v. Krasnigor*, 536 N.E.2d 1078 (Mass. 1989); *Metropolitan Property & Casualty Insurance Co. v. Ham*, 930 S.W.2d 5 (Mo. Ct. App. 1996); *Aetna Casualty & Surety Co. v. Cigany*, No. 73230, 73242, 1998 WL 655495 (Ohio Ct. App. Sept. 24, 1998); *Unigard Mutual Insurance Co. v. Argonaut Insurance Co.*, 579 P.2d 1015 (Wash. Ct. App. 1978).

203. Cases in which insurance covers acts of setting fires include: *Seaburg v. Williams*, 161 N.E.2d 576 (Ill. App. Ct. 1959); *Allstate Insurance Co. v. Sparks*, 493 A.2d 1110 (Md. Ct. Spec. App. 1985); *Connecticut Indemnity Co. v. Nestor*, 145 N.W.2d 399 (Mich. Ct. App. 1966); *Michigan Millers Insurance Co. v. Anspach*, 672 N.E.2d 1042 (Ohio Ct. App. 1996); *Eisenman v. Hornberger*, 264 A.2d 673 (Pa. 1970); *Miller v. Fidelity-Phoenix Insurance Co.*, 231 S.E.2d 701 (S.C. 1977); *Prosser v. Leuck*, 539 N.W.2d 466 (Wis. Ct. App. 1995).

204. See *supra* note 108 and accompanying text.

205. See *Aetna Cas. & Sur. Co. v. Cigany*, No. 73230, 73242, 1998 WL 655495, at *3 (Ohio Ct. App. Sept. 24, 1998).

teddy bear located in the school's storage area.²⁰⁶ The fire spread and caused over \$500,000 in property damage. The court construed the word "accidental" in the occurrence definition to mean "an unexpected happening without intention or design."²⁰⁷ In applying the definition, the court found the insured intended to cause property damage, and thus his actions were not accidental and were outside of the occurrence definition.²⁰⁸

Under the intentional exclusion clause, intent to cause injury, in the form of property damage, can be inferred as a matter of law.²⁰⁹ Three youths broke into an unattended junior high school and set numerous small fires, including lighting matches in boxes of library books in several different locations.²¹⁰ The youths then left without attempting to extinguish the fires. Approximately \$1.3 million in property damage resulted from the fires.²¹¹ The court found that the insured youth intended to cause property damage to the school.²¹² In inferring intent, the court considered the nature of the act—setting fires in an unattended building—and the foreseeability of the fire spreading.²¹³

Other courts have applied the majority view test but used an objective standard.²¹⁴ The Delaware Supreme Court decided that a juvenile's act of starting a fire in a trash pile and moving it close to a building, subsequently destroying the building, is excluded from insurance coverage under the intentional acts exclusion.²¹⁵ It did not matter that the minors only intended to damage the trash pile because it was entirely foreseeable that moving burning trash close to a building would damage the building.²¹⁶

Similarly, in a Missouri case, a fourteen-year-old helped set fire to a juvenile detention center in order to escape.²¹⁷ The court rejected the minor's argument that the act should be covered by insurance because she only intended to create a diversionary fire and did not intend to damage the entire building.²¹⁸ The court

206. *See id.* at *1.

207. *Id.* at *2 (citation omitted).

208. *See id.* at *3; *see also* *Unigard Mut. Ins. Co. v. Argonaut Ins. Co.*, 579 P.2d 1015, 1018 (Wash. Ct. App. 1978) (defining "accident" to require a result that is unforeseen, involuntary, unexpected, and unusual and finding an 11-year-old's deliberate act of setting a fire in a school building voluntary).

209. *See City of Newton v. Krasnigor*, 536 N.E.2d 1078, 1081 (Mass. 1989).

210. *See id.* at 1080.

211. *See id.* at 1080-81.

212. *See id.* at 1082.

213. *See id.* at 1081 n.7.

214. *See Farmer in the Dell Enters., Inc. v. Farmers Mut. Ins. Co. of Del., Inc.*, 514 A.2d 1097, 1099 (Del. 1986); *Ash/Ramunno Assocs., Inc. v. Nationwide Mut. Fire Ins. Co.*, No. 95C-11-158 SCD, 1996 WL 658819, at *1 (Del. Super. Ct. Oct. 22, 1996); *Metropolitan Prop. & Cas. Ins. Co. v. Ham*, 930 S.W.2d 5, 7 (Mo. Ct. App. 1996).

215. *See Farmer in the Dell Enters., Inc.*, 514 A.2d at 1099-1100.

216. *See id.* at 1100.

217. *See Metropolitan Prop. & Cas. Ins. Co.*, 930 S.W.2d at 6.

218. *See id.* at 7.

found that the destruction of the building was a natural and probable consequence of the act and, therefore, not covered by insurance.²¹⁹

The majority of courts hold that only the intent to harm, not the extent of harm, matters.²²⁰ However, a recent Wisconsin case distinguishes intent to cause some harm from harm that occurred, by requiring the resultant harm to be substantially certain to follow.²²¹ Rather than using a foreseeability or probable consequence standard, the court broadened insurance coverage by excluding only acts where the resultant harm is substantially certain to follow.²²² In *Prosser*, a thirteen-year-old and his friends broke into a warehouse and found a gasoline can and a lighter.²²³ The boys poured a couple of small drops of gasoline on a concrete window sill and lit them. While the drops were burning, one of the boys sprinkled more gasoline on the drops. Flames rose causing the boy to drop the burning gasoline can.²²⁴ The boy then kicked it through a hole in the floor. The fire spread throughout the warehouse and caused extensive damage. The court applied the majority view test, but limited intent to injure to only cases where the resultant harm was substantially certain to follow.²²⁵ The court concluded that the expected harm of a stain resulting from lighting small drops of gasoline on the window ledge insufficient to satisfy the intent to cause injury requirement.²²⁶ The court's rationale is similar to the *Haht* decision, which held that the act of an eleven-year-old hitting his playmate with a baseball did not rise to the level of intent needed to cause injury.²²⁷ In both cases, the likelihood of injury is too far removed from the act to satisfy the required intent.²²⁸

219. See *id.*; see also *United States Fidelity & Guaranty Co. v. American Employers' Insurance Co.*, 205 Cal. Rptr. 460 (Cal. Ct. App. 1984) for application of the majority view test using the subjective standard.

220. See *United States Fidelity & Guar. Co.*, 205 Cal. Rptr. 460 at 468; *Farmer in the Dell Enters., Inc.*, 514 A.2d at 1100; *City of Newton v. Krasnigor*, 536 N.E.2d 1078, 1081 (Mass. 1989); *Aetna Cas. & Sur. Co. v. Cigany*, No. 73230, 73242, 1998 WL 655495, at *3 (Ohio Ct. App. Sept. 24, 1998).

221. See *Prosser v. Leuck*, 539 N.W.2d 466, 469 (Wis. Ct. App. 1995).

222. See *id.*

223. See *id.* at 467.

224. See *id.*

225. See *id.* at 469. But see *Pachucki v. Republic Ins. Co.*, 278 N.W.2d 898, 903-04 (Wis. 1979).

226. See *id.*; see also *Michigan Millers Ins. Co. v. Anspach*, 672 N.E.2d 1042, 1048-49 (Ohio Ct. App. 1996) (holding the resulting bodily injury from a robbery and fire to cover up the robbery was not excluded from insurance coverage because the insured only intended property damage, did not know the building was occupied, and could not have reasonably expected bodily injury).

227. See *Amco Ins. Co. v. Haht*, 490 N.W.2d 843, 845 (Iowa 1992). But see *Westfield Ins. Co. v. Blamer*, No. 98AP-1576, 1999 WL 680162 (Ohio Ct. App. Sept. 2, 1999) (holding that the finding of coverage in *Michigan Millers Insurance Co. v. Anspach* not maintained under the law today because the bodily injury "flowed from" the intentional acts of others directing the robbery who knew that the house was occupied).

228. See *supra* text accompanying notes 188-200.

Other courts finding insurance coverage for intentional acts have looked at the nature of the act to determine if injury is expected; the act of setting a fire compared with a fire occurring incidental to another intentional act. In a Maryland case, a mill was burned after boys ignited gas fumes with a cigarette lighter they were using to illuminate their attempt to steal gas. The court held that the boys did not intend to cause property damage.²²⁹ Similarly, an earlier decision by a Pennsylvania court held that a seventeen-year-old who broke into a home to steal liquor did not intend to cause property damage when a match he lit to find his way around the house smoldered and subsequently caused a fire.²³⁰ The Pennsylvania court also discussed possible overriding public policy considerations that would preclude insurance coverage but found none.²³¹ Because the insurance policy was not purchased to cover the crime, the policy obviously did not promote the crime, did not serve as a deterrent to the crime, and did not save the insured from the effects of his unlawful act.²³²

An act involving a younger boy setting a fire was also covered by insurance.²³³ A ten-year-old boy set fire to a home primarily as a prank; he wanted the excitement of seeing the fire trucks come.²³⁴ The court found that the boy had no conscious intent to cause property damage.²³⁵ However, the dissent pointed out that the minor had broken into the home and set separate fires in two rooms by lighting papers and pictures.²³⁶ Although the majority did not identify age as a factor in their decision, it is reasonable to infer that age indeed was a deciding factor.²³⁷ If an average fifteen-year-old had set these fires as a prank, it is doubtful the court would find a lack of conscious intent to cause damage.²³⁸ In addition, the case was decided in 1977. A ten-year-old's actions and intent might be viewed differently today—more than twenty years later.

An earlier case yielded similar results. An eight-year-old set fire to a neighbor's home causing significant property damage.²³⁹ The child testified that he started the fire to frighten the neighbor's children because he was angry with

229. See *Allstate Ins. Co. v. Sparks*, 493 A.2d 1110, 1113 (Md. Ct. Spec. App. 1985).

230. See *Eisenman v. Hornberger*, 264 A.2d 673, 674 (Pa. 1970).

231. See *id.* at 675.

232. See *id.*

233. See *Miller v. Fidelity-Phoenix Ins. Co.*, 231 S.E.2d 701 (S.C. 1977).

234. See *id.* at 702.

235. See *id.*

236. See *id.* at 703 (Littlejohn, J., dissenting).

237. In its decision, the court cited an earlier case, *Connecticut Indemnity Co. v. Nestor*, 145 N.W.2d 399, 401 (Mich. Ct. App. 1966), which specifically held age as the reason for not finding intent to cause damage. See *id.* at 702.

238. Cf. *Willis v. Campbell*, No. 97-CA-S7, 1998 WL 46685, at *1 (Ohio Ct. App. Feb. 6, 1998) (finding a reasonable thirteen-year-old should have anticipated injury when firing a gun near a person's head); *Chapman v. Wisconsin Serv. Ins. Corp.*, 523 N.W.2d 152, 154 (Wisc. Ct. App. 1994) (finding a fourteen-year-old intended to injure when shooting a BB gun).

239. See *Connecticut Indem. Co. v. Nestor*, 145 N.W.2d 399, 400 (Mich. Ct. App. 1966).

them, but that he did not intend to burn the house.²⁴⁰ The court held the child intentionally set the fire, but because of his "tender age", he did not intend to damage the house.²⁴¹ Finally, an Illinois case involving a five- and one-half-year-old who set a fire used the same rationale to find insurance coverage for the act.²⁴² The court stated, "Based upon the evidence of defendant's age, capacity, intelligence and experience, we conclude that he lacked the mental and moral capacity to possess the intent to do the act complained of."²⁴³

Although these cases are more evenly split between including and excluding the acts from insurance coverage, the inclusions basically fall into two categories. The first category centers on acts which do not specifically involve setting fires—the fire and its resultant property damage were not intended. Fires incidental to other intentional acts, such as stealing, are covered by insurance. The second category is age specific. Younger children, due to their age, lack intent to cause property damage even though they commit an intentional act by setting a fire. Fires set by older minors are, for the most part, excluded from insurance coverage.

CONCLUSION

Through the years, courts have continued to broaden the intentional acts exclusion and the occurrence definition in insurance policies. The result has been to deny insurance coverage for minors' intentional acts. In cases involving shootings with firearms and physical assaults, almost all of the courts have found no insurance coverage. However, courts are less certain to exclude insurance coverage for acts involving shooting with BB guns or arson. A major reason for distinguishing shooting with BB guns from shooting with firearms or punching someone is the certainty of injury. A punch or a bullet is substantially certain to cause some type of injury whereas a BB gun pellet may "sting" a person without causing injury. When an act is not certain to cause injury, then the question of the actor's intent is more crucial in determining insurance coverage.

Courts are less willing to exclude acts of arson from insurance coverage. Although a fire is almost certain to cause property damage, if not bodily injury, courts are reluctant in some cases to exclude the act of setting a fire from insurance coverage. The courts' reluctance centers on one of two major factors: the act itself or the age of the actor. When the fire is incidental to the intended act, then the courts do not apply the intentional acts exclusion. The actor's age is also central to determining intent to injure. Courts have found minors under the age of eleven do not form intent to injure where they claim to have set the fire for reasons other than to cause property damage.

Age does not appear to be a major factor in the other types of intentional acts. Courts infer intent or find actual intent, regardless of the minor's age, in

240. *See id.*

241. *Id.* at 401.

242. *See Seaburg v. Williams*, 161 N.E.2d 576 (Ill. App. Ct. 1959).

243. *Id.* at 578.

cases involving shootings with firearms, shootings with BB guns, and physical assaults. However, the cases raised on appeal usually involve teenage insureds. As a child ages and matures, age will become less of a factor in determining intent, both objectively and subjectively. If projections hold true and the minor population increases with younger children committing more crimes, it will be interesting to see if the courts begin to cite age as a major factor in ascertaining intent to injure.

Exceptions to finding intent to injure are fairly limited. The exceptions, while not discussed in each intentional act category, can probably be applied to all categories. Mental illness, self-defense, unintentional act, and uncertainty of injury are defenses used by insureds to argue for insurance coverage. However, these defenses have high public policy hurdles to clear before the courts will accept them and find that insurance companies should pay for the victim's injury.

The primary function of insurance coverage is to protect insureds from financial responsibility incurred as a result of events beyond their control. Insurance is not designed to protect insureds from intentional acts and expected injuries. By finding insurance coverage for intentional acts and resulting injuries, courts alter the function of insurance. Such a change then defeats one of the primary public policy considerations underlying the function of insurance: it allows the insured to escape financial responsibility for actions that she can control. Insurance then facilitates the insured's intentional action rather than deterring it.

For minors, underlying public policy considerations may not be as strong. It is doubtful that the existence of an insurance policy impacts a minor's decision to commit an intentional act. Financial responsibility to the victim probably does not enter into the minor attacker's mind. However, regardless of its impact on an individual minor, society must deter minors, including younger children, from intentional acts that cause bodily injury or property damage. Punishing minor attackers through the criminal justice system is just one way to accomplish society's overriding goal. Another way is to exclude intentional acts from insurance coverage and to require the minor attacker to take financial responsibility for compensating his victim. Although this way may not send a message to the individual minor, it does send a message to parents of minors, as well as to society as a whole. Shootings, assaults, fires—acts where someone can get hurt or something can get damaged—will not be condoned no matter what age the attacker.

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